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IN THE

Supreme Court of the United States

October Term, 197.....

No. 73-999

WILLIAM PAUL KOHNE and
PAUL PATRICK WOODS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Involved	3
Constitutional Provisions and Statutes Involved	3
Statement of the Case	6
(1) Basis of Jurisdiction in First Instance	8
Reasons for Granting Writ	8

APPENDIX.

United States District Court for the Western District of Pennsylvania, Opinion of August 27, 1972: United States v. Kohne, 347 F. Supp. 1178 (W.D. Pa. 1972)	11
United States District Court for the Western District of Pennsylvania, Memorandum and Order dated January 26, 1973	31
United States District Court for the Western District of Pennsylvania, Opinion of April 23, 1973: United States v. Kohne, 358 F. Supp. 1046 (W.D. Pa. 1973)	39
United States District Court for the Western District of Pennsylvania, Opinion and Order dated April 24, 1973	55
United States District Court for the Western District of Pennsylvania, Opinion of April 25, 1973: United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973)	65
United States District Court for the Western District of Pennsylvania, Memorandum and Order dated May 15, 1973	89
Judgment Order of the United States Circuit Court of Appeals for the Third Circuit affirming the judgments of sentence of the United States District Court for the Western District of Pennsylvania, November 26, 1973	95
Constitutional Provisions and Statutes Involved	97

Table of Cases.

	PAGE
Mattox v. United States, 146 U. S. 140, 13 Sp. Ct. 50, 36 L. Ed. 917 (1892)	10
United States v. Cafero, 473 F. 2d 489 (3rd Cir. 1973)	9
United States v. Ceraso, 467 F. 2d 653 (3d Cir. 1972)	9
United States v. Chavez, 478 F. 2d 512 (9th Cir. 1973)	9
United States v. Giordano, 469 F. 2d 522 (4th Cir. 1972)	9
United States v. King, 478 F. 2d 494 (9th Cir. 1973)	9
United States v. Robinson, 472 F. 2d 973 (5th Cir. 1973)	9

United States Constitution.

Amendment IV	3, 10
Amendment V	3, 10
Amendment VI	3, 4

United States Statutes.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code, Sections 2510 through 2520	3, 6
Title VII of the Omnibus Crime Control Act of 1970, 18 United States Code, Section 1955	3
18 United States Code, Section 371, Act of June 25, 1948, c. 645, 62 Stat. 701, United States Statutes at Large, Volume 62, Part 1, Page 701	5, 8
18 United States Code, Section 1952	8
18 United States Code, Section 1955, Added Pub. L. 91-452, Title VIII, Section 803 (a), Act of October 15, 1970, 84 Stat. 937, United States Statutes at Large, Volume 84, Part 1, Pages 937, 938	1, 2, 4
18 United States Code, Sections 2516, 2518 (1)(a) and 2518 (4)(d), Added Pub. L. 90-351, Title III, Section 802, June 19, 1968, 82 Stat. 212, United States Statutes at Large, Volume 84 Part 1, Pages 1893 *et seq.*	5, 6

PAGE

28 United States Code, Section 1954(1); Act of June 25, 1948, c. 646, 62 Stat. 928 2

Wire Interception Act 8, 10

Sections 2516 and 2518 (1)(a) and 2518 (4)(b) ... 8

Section 2518 (4)(d) 8

MISCELLANEOUS.

U. S. Code, Cong., and Adm. News 90th Cong., 2d Sess. 1968 at page 2185 9

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, William Paul Kohne and Paul Patrick Woods, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered November 26, 1973, affirming a judgment of the United States District Court for the Western District of Pennsylvania, finding Petitioners in violation of 18 U. S. C. § 1955.

Opinions Below

United States of America v. William Paul Kohne, *et al.*, Crim. A. No. 71-254, 347 F. Supp. 1178, dated August 25, 1972 (W.D. Pa. 1972); United States of America v. Willam Paul Kohne, *et al.*, Crim. A. No. 71-254, 358 F. Supp. 1046, April 23, 1972 (W.D. Pa. 1973); United States of America v. William Paul Kohne, *et al.*, Crim. A. No. 71-254, 358 F. Supp. 1053, April 25, 1973 (W.D. Pa. 1973).

Jurisdiction

On November 26, 1973, the United States Court of Appeals for the Third Circuit at No. 73-1500 and 73-1501 affirmed the judgments of sentence of Petitioners of the United States District Court for the Western District of Pennsylvania at Crim. A. No. 71-254 for the violation of 18 United States Code, Section 1955 by a Judgment Order without opinion, indicating that the Court had considered all issues raised by the Petitioners.

There was no Petition for rehearing in the Circuit Court and there was no Petition for an extension of time within to file this Petition for a Writ of Certiorari in this Court.

Jurisdiction of this Court is invoked under 28 United States Code, Section 1954(1); Act of June 25, 1948, c. 646, 62 Stat. 928.

Questions Involved

(1) Is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 United States Code, Sections 2510 through 2520 constitutional?

(2) Is Title VII of the Omnibus Crime Control Act of 1970, 18 United States Code, Section 1955 constitutional?

(3) Did the Government fail to prove compliance with 18 United States Code, Sections 2516 and 2518 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 which specifies the manner in which the Justice Department through the Attorney General may authorize the application to the court for the interception of wire or oral communications?

(4) Did the coercive atmosphere during the jury deliberation (a juror was physically threatened and severely harassed during a period of deliberations lasting over twenty-four hours) deprive Appellants of a fair and impartial trial by a unanimous verdict in violation of the Sixth Amendment to the Constitution of the United States?

Constitutional Provisions and Statutes Involved

(1) The Fourth Amendment to the Constitution of the United States,

> "The right of the people to be secure and their persons, houses, papers and affects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized."

(2) The Fifth Amendment to the Constitution of the United States,

"No person shall . . .; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of Law; . . ."

(3) The Sixth Amendment to the Constitution of the United States,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . ."

(4) 18 United States Code, Section 1955, Added Pub. L. 91-452, Title VIII, Section 803 (a), Act of October 15, 1970, 84 Stat. 937, United States Statutes at Large, Volume 84, Part 1, Pages 937, 938.

"(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) 'illegal gambling business' means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) 'gambling' includes but is not limited to pool-selling, book-making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States."

(5) 18 United States Code, Section 371, Act of June 25, 1948, c. 645, 62 Stat. 701, United States Statutes at Large, Volume 62, Part 1, Page 701.

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

(6) 18 United States Code, Sections 2516, 2518 (1)(a) and 2518(4)(d), Added Pub. L. 90-351, Title III, Section 802, June 19, 1968, 82 Stat. 212, United States Statutes at Large, Volume 84 Part 1, Pages 1893 *et seq.*

Section 2516:

"(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—"

Section 2518:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application; . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify . . .
>
> (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and . . ."

The remaining sections of 18 United States Code 2510 to 2520 are set forth in the Appendix.

Statement of the Case

From February 1, 1971 until May 15, 1971, intermittently, the telephones of these Petitioners and others were monitored by the Federal Bureau of Investigation pursuant to the authorization by Court Orders under 18 United States Code, Sections 2510 through 2520 inclusively. Subsequently to the monitoring, search warrants were issued and certain gambling paraphernalia were seized from Petitioners, but the far greater portion of the Government's proof against Petitioners at the six week trial which followed was the contents of the intercepted oral communications by telephone.

Each of the applications for a court order was supported by a memorandum unsigned but initialed by then Attorney

General John N. Mitchell. Each of the memoranda was addressed to Assistant Attorney General, Will Wilson, and contained the following authorization:

> "Pursuant to the powers conferred on me by Section 2516 of Title 18, United States Code, you are hereby specifically designated to exercise those powers for the purpose of authorizing Kenneth A. Brovo to make the above described application."

The only logical meaning from the memoranda is that former Attorney General Mitchell did not authorize the interception himself but specially delegated his authority to former Assistant Attorney General Will Wilson. To compound the matter, the application for the court authorization to intercept the oral communications was not signed by Will Wilson but was signed by Henry E. Petersen who was a deputy Attorney General at that time. By affidavit of June 9, 1972, more than a year after the authorization, former Attorney General John N. Mitchell states that his memoranda to Assistant Attorney General Will Wilson was only a notification that the discretionary action of approving the applications to the court was taken by him. There is nothing in the Government's proof to indicate that the ostensibly specially designated Assistant Attorney General Will Wilson knew anything about the case or had anything to do with the applications for the Court Orders; John N. Mitchell is not identified in either the application nor the Court Order.

II

The jury deliberated for more than twenty-four hours and were required to spend the night on cots at the William Penn Hotel in Pittsburgh, Pennsylvania. A total of five male jurors in one manner or another threatened Juror Number 10, Steve Tisak, ranging from an implied threat of

murder by a male who was so nervous that he could not eat his dinner, a menacing flexing of muscles by another juror, a slamming of his fist into his hand by another juror while saying "I don't get mad I just get even," to the angry shouts of two other male jurors that they are going broke because of this overnight business. There is no question that all of the threats and hostility were directed at Juror Number 10, Steve Tisak.

(1) Basis of Jurisdiction in first instance.

Appellants were indicted for the entry into an unlawful conspiracy under 18 United States Code, Section 371 on Count 1 and the participation in organized gambling under 18 United States Code, Section 1952 on Count 2. They were convicted on the Second Count on February 14, 1973. Appellant Kohne was sentenced on May 4, 1973, and Appellant Woods was sentenced on May 15, 1973. An Appeal was timely taken to the United States Court of Appeals for the Third Circuit.

Reasons for Granting Writ

There is pending unresolved a direct conflict in the decisions of the Third Circuit Court of Appeals which does not require compliance with Sections 2516 and 2518 (1)(a) and 2518 (4)(b) of the Wire Interception Act and other Courts of Appeal. Section 2516 provides that either the Attorney General himself personally must authorize the application or he must specially designate one of the nine Assistant Attorney Generals to authorize the application. Section 2518 (1)(a) requires that the officer authorizing the application for the interception be identified in the application itself; Section 2518 (4)(d) requires that the person authorizing the application be identified in the Order of Court.

The Third Circuit Court of Appeals is willing to accept a subsequent affidavit by the Attorney General, his Assistant or others which tend to identify a single person responsible to the public after the fact. In the instant case, the court when acting on the application, the critical time, not only did not know the identity of the authorizing officer but acted upon the misrepresentation that one of the nine Assistants to the Attorney General signed the applications; nor does former Attorney General John N. Mitchell appear in either the application or Order of Court but only is identified as the authorizing officer by affidavit over one year later. Also, his initialed memoranda clearly indicate that he specially delegated his authority to Will Wilson who did not in any manner participate in the case.

The Ninth, Fourth and Fifth Circuit Courts of Appeal require a compliance with the act at the time the application is acted upon by the Court and will not consider corrective after the fact affidavits as compliance. In substance, these Courts of Appeal say that there must be compliance at the time the decision is made either to invade individual rights or not to do so. The rationale is that such a practice leads to institutional decisions and does not focus responsibility on a single person responsible to the public as intended by Congress and reflected in the legislative history and can also lead to the evasion of responsibility later, U.S. Code, Cong., and Adm. News 90th Cong., 2d Sess. 1968 at page 2185.

For the conflict in the Circuit Courts, see: United States v. Ceraso, 467 F. 2d 653 (3d Cir. 1972); United States v. Cafero, 473 F. 2d 489 (3rd Cir. 1973); *contra,* United States v. Chavez, 478 F. 2d 512 (9th Cir. 1973); United States v. Giordano, 469 F. 2d 522 (4th Cir. 1972); United States v. King, 478 F. 2d 494 (9th Cir. 1973); United States v. Robinson, 472 F. 2d 973 (5th Cir. 1973).

Secondly certiorari should be granted because of the important federal question on the constitutionality of the Wire Interception Act being violative of the Fourth Amendment as an unreasonable search and seizure and the Fifth Amendment as violative of the Privilege against self incrimination.

As to the juror coercion question, see Mattox v. United States, 146 U.S. 140, 13 Sp. Ct. 50, 36 L. Ed. 917 (1892).

Respectfully submitted,

JAMES R. FITZGERALD,
Attorney for Petitioners,
William Paul Kohne and
Paul Patrick Woods.

APPENDIX

United States District Court for the Western District of Pennsylvania, Opinion of August 27, 1972: United States v. Kohne, 347 F. Supp. 1178 (W.D. Pa. 1972)

UNITED STATES OF AMERICA,

v.

WILLIAM PAUL KOHNE *et al.*

Crim. No. 71-254.

United States District Court,
W. D. Pennsylvania.
Aug. 25, 1972.

Proceedings on motions of defendants to suppress evidence and dismiss indictment charging conspiratorial and substantive offenses of conducting an illegal gambling business. The District Court, Marsh, Chief Judge, held, *inter alia,* that notwithstanding claim that affidavit for search warrant did not set forth probable cause because it was based on facts occurring long prior to search, where affidavit showed that there was probable cause to believe that defendants operated a gambling business from June, 1970 to May, 1971, and also set out that, as recently as July 8, 1971, a confidential informant verified that by reason of his personal gambling activities he knew that defendants continued to operate a gambling business, information supplied by confidential informant updated earlier information, and affidavit set out probable cause for issuance of search warrant on July 11, 1971.

Motion denied.

1. Telecommunications —492

Provisions of Omnibus Crime Control and Safe Streets Act authorizing interception of private telephone communications on a showing of probable cause are not unconstitutional. 18 U.S.C.A. §§ 2510-2520.

2. Telecommunications —496

Application for wiretap authorization which was personally reviewed and granted by Attorney General complied with requirements of statute and was valid even though it incorrectly appeared on court records that another person was authorizing officer. 18 U.S.C.A. § 2516(1).

3. Telecommunications —496

Affidavits which supported wiretap authorizations and which showed that certain telephone company toll records were in hands of government authorities at time affidavits were prepared were not invalid on basis of claim that government represented to court that records were obtained by grand jury subpoena, but could not verify if records were in fact ever presented to a grand jury, where records were not governed by Omnibus Crime Control and Safe Streets Act and thus were not produceable in response to a subpoena issued by a court of competent jurisdiction, and defendant had no proprietary interest in records, in that search was directed against telephone company and not defendants. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

4. Telecommunications —496

Statute dealing with unauthorized publication or use of telegraph, telephone, and radio communications was not designed to render evidentially inadmissible records which are made in ordinary course of a telephone company's business and which are essential to ordinary operation of that business. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

5. Telecommunications —496

Affidavits which supported wiretap authorizations and which were based on three sources of information, namely, toll slips, other wiretaps, and confidential informants, were sufficient to establish probable cause for issuance of interception orders as to all defendants named in indictment, where affidavits indicated why informants were credible and information supplied reliable, and further set forth underlying circumstances necessary to enable judge authorizing wiretap to pass on validity of informants' conclusions and to find a substantial basis for crediting informants' information. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

6. Gaming —60

Notwithstanding claim that affidavit for search warrant did not set forth probable cause because it was based on facts occurring long prior to search, where affidavit showed that there was probable cause to believe that defendants operated a gambling business from June, 1970 to May, 1971, and also set out that, as recently as July 8, 1971, a confidential informant verified that by reason of his personal gambling activities he knew that defendants con-

tinued to operate a gambling business, information supplied by confidential informant updated earlier information, and affidavit set out probable cause for issuance of search warrant on July 11, 1971. 18 U.S.C.A. §§ 371, 1955.

7. Searches and Seizures —5

Notwithstanding claim that $1,900 in cash seized by officers was not an integral part of any gambling operation so as to be of evidential value at trial, where it was disclosed at evidentiary hearing that Internal Revenue Service had filed a lien against money, so determination of whether money should be returned to defendants, forfeited under statute or turned over to Internal Revenue Service was premature, motion to return money prior to trial would be denied. 18 U.S.C.A. §§ 371, 1955.

8. Gaming —63(1)

Statute prohibiting anyone from conducting an illegal gambling business is not unconstitutional. 18 U.S.C.A. § 1955.

9. Conspiracy —23

One of purposes of general conspiracy statute is to punish concerted action involving a plurality of actors which makes crime easier to perpetrate and harder to detect. 18 U.S.C.A. § 371.

10. Gaming —62

By virtue of definition of an illegal gambling business, it is a prerequisite that concerted action of five or more persons be involved before a federal crime has been committed. 18 U.S.C.A. § 1955.

11. Conspiracy —28

If a substantive violation of illegal gambling statute is proved, concerted action proving violation cannot be used to automatically convict defendants of conspiracy because, in such context, conspiracy violation does not require proof of a fact which was not also essential to proof of gambling violation, i.e., there would be no additional element in proof of conspiracy to which additional punishment could attach. 18 U.S.C.A. §§ 371, 1955.

12. Conspiracy —23

General conspiracy statute can punish conspiratorial conduct which does not amount to a substantive violation of illegal gambling statute. 18 U.S.C.A. §§ 371, 1955.

13. Conspiracy —40

Absent a clear legislative intent to contrary, persons conspiring with members of an established illegal gambling business and committing an overt act not amounting to a substantive violation, but facilitating such a business or aimed at eventual criminal participation therein, can be held responsible under general conspiracy statute. 18 U.S.C.A. §§ 371, 1955.

14. Indictment and Information —129(1)

Defendants could be charged in one count with conspiring to violate illegal gambling statute and thereby violating general conspiracy statute and charged in another count with actually conducting an illegal gambling business and thereby committing substantive violations of illegal gambling statute, notwithstanding claim that conspiracy count represented a duplication of substantive offense and was subject to dismissal. 18 U.S.C.A. §§ 371, 1955.

Samuel J. Orr, III, Asst. U. S. Atty., Pittsburgh, Pa., for United States.

James A. Ashton, Pittsburgh, Pa., for defendants, William Paul Kohne, Patrick Denham, and Jeanine Denham.

Martin M. Sheinman, Pittsburgh, Pa., for defendants, Jeanne Kosh, Patsy Stanizzo and Betty Howden Stanizzo.

Ray Radakovich, Pittsburgh, Pa., for defendant, Joseph Tabella.

P. J. McArdle, McArdle & Mansmann, Pittsburgh, Pa., for defendant, James Quay.

James R. Fitzgerald, Pittsburgh, Pa., for defendant, Paul Patrick Woods.

Gilbert M. Gerber, Pittsburgh, Pa., for defendant, Frank DeLucia.

OPINION AND ORDER.

MARSH, *Chief Judge.*

The defendants in this case have been charged in a two-count indictment with conspiring to violate 18 U.S.C. § 1955 in violation of 18 U.S.C. § 371 (Count One) and with the substantive violation, and aiding and abetting the substantive violation, of 18 U.S.C. § 1955 (Count Two). A large portion of the government's evidence against these defendants has apparently been derived from court-authorized wiretaps installed upon certain telephones under the authority of 18 U.S.C. §§ 2510-2520.

The defendants have filed numerous motions;[1] an evidentiary hearing was held, and at this hearing and by orders issued afterwards many motions were ruled upon

[1] The docket entries in this case reveal that 29 substantive motions have been filed by defendants to date.

and disposed of. This memorandum is to dispose of defendants' motions aimed at suppressing evidence and dismissing the indictment.

With the exception of the motions of defendants Patsy Stanizzo and Betty Howden Stanizzo the motions to suppress evidence are aimed at the constitutionality, validity and purity of the procedures utilized by the government in this case in installing and gathering evidence against these defendants via court-authorized wiretaps. The following points have been raised by the defendants which merit some discussion:[2]

1. The statute authorizing interception of telephone communications, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510, 2520 is unconstitutional.

2. The applications for the court orders authorizing interceptions of telephone communications were not properly authorized.

3. Toll records of the telephone company were illegally obtained by the United States Attorney's Office and used in the applications for court orders authorizing interceptions.

4. The court orders authorizing interceptions were not based upon probable cause.

5. The search of the residence of Patsy Stanizzo and Betty Howden Stanizzo was not based upon probable

[2] A comparison of the points raised here with those raised in United States v. Iannelli 339 F.Supp. 171 (W.D.Pa.1972), shows that many points raised in this case have already been disposed of by Judge Weis in his Iannelli opinion.

cause, and certain monies seized in that search should be returned.

In addition, the defendants have moved to dismiss the indictment asserting:

6. The illegal gambling businesses statute, 18 U.S.C. § 1955, is unconstitutional.

7. The conspiracy count represents a duplication of the substantive offense set out in 18 U.S.C. § 1955 and should be dismissed.

1. Constitutionality of 18 U.S.C. §§ 2510-2520.

The constitutionality of the provisions of 18 U.S.C. §§ 2510-2520, which authorize the interception of private telephone communications upon a showing of probable cause are currently before numerous Circuit Courts, and the defendants have not put great emphasis on this point in their briefs.

[1] The standards for testing the constitutionality of a wiretap statute are set forth in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967); and Osborn v. United States, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966). Nothing said in the defendants' skeletal briefs on this issue has convinced us that the provisions of 18 U.S.C. §§ 2510-2520 do not meet these standards or that they are, *per se*, outside the parameters of the constitutional guarantees protecting the privacy of individuals. The majority of cases passing on this issue have held that the provisions of 18 U.S.C. §§ 2510-2520, as written by Congress, are constitutional. United States v.

Cox, 449 F.2d 679 (10th Cir. 1971); United States v. LaGorga, 336 F.Supp. 190 (W.D.Pa.1971); United States v. King, 335 F.Supp. 523 (S.D.Cal.1971); United States v. Perillo, 333 F.Supp. 914 (D.C.Del.1971); United States v. Leta, 332 F.Supp. 1357 (M.D.Pa.1971); United States v. Scott, 331 F.Supp. 233 (D.C.D.C.1971); United States v. Cantor, 328 F.Supp. 561 (E.D.Pa.1971); United States v. Sklaroff, 323 F.Supp. 296 (S.D.Fla.1971); *contra,* United States v. Whitaker, 343 F.Supp. 358 (E.D.Pa.1972). We follow the majority and hold 18 U.S.C. §§ 2510-2520 to be constitutional.

2. Authorization for Wiretaps.

The defendants complain that the wiretaps were not properly authorized as required by 18 U.S.C. § 2516(1) which provides:

> "(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications • • •."

Initially, to clarify this issue, the government filed the affidavits of Sol Lindenbaum and Henry E. Petersen. Sol Lindenbaum's affidavit avers that Attorney General Mitchell personally initialed the memoranda on February 1, March 3, March 24, and May 6, 1971, authorizing Will Wilson to exercise the powers conferred on the Attorney General under 18 U.S.C. § 2516(1). Henry E. Petersen's affidavit shows that following approval in the office of the Attorney General, he, rather than Will Wilson, signed Will

Wilson's name to letters authorizing Kenneth A. Bravo to present applications to this court requesting approval of the wiretaps involved in this case.

At the evidentiary hearing Attorney Ashton cast a cloud over the accuracy of the Lindenbaum affidavit by producing a memorandum from the case of United States v. LaGorga, supra, 33 F.Supp. p. 195, purportedly initialed by Attorney General Mitchell, but which, when compared with the memoranda in this case, showed distinctly different handwriting on the two memoranda. This court indicated that it was inclined to allow the defendants to depose the former Attorney General to determine if he had, in fact, initialed both memoranda. The government then brought to the attention of the court that certain of the memoranda in the *LaGorga* case had not been personally signed by Attorney General Mitchell.[3] To dispel any confusion that existed concerning who authorized and initialed the memoranda in this case, the defendants were given permission to depose former Attorney General Mitchell by way of written interrogatories. The defendants submitted written interrogatories. Mr. Mitchell did not answer these interrogatories but instead presented an affidavit which established to the satisfaction of the court that the memoranda in this case were initialed by Attorney General Mitchell personally.[4]

---

[3] As a result of this admission by the government, Judge Weis ordered that certain wiretap evidence be suppressed in the case of United States v. LaGorga, *supra*. (See amended order entered April 12, 1972, United States v. LaGorga, 340 F. Supp. 1397 (W.D.Pa. 1972.) The government has taken an appeal from this order.

[4] One of the defendants, William Kohne, has moved to dismiss the indictment against him on the basis that the government failed to satisfactorily answer the written interrogatories submitted to former Attorney General Mitchell. A decision on this motion is pending.

[2] We are faced with a split of authority concerning the validity of the authorization which occurred in this case. Two district courts have recently indicated that such memoranda would be insufficient to comply with § 2516(1). See: United States v. Casale, 341 F.Supp. 374 (M.D.Pa. 1972); United States v. Focarile, 340 F.Supp. 1033 (D.C. Md. 1972). But, the majority of the courts passing on the issue have concluded that a memorandum personally initialed by the Attorney General meets the requirements of 18 U.S.C. § 2516(1). United States v. Pisacano, 459 F.2d 259 (2d Cir. 1972); United States v. Consiglio, 342 F.Supp. 556 (D.C.Conn. 1972); United States v. Doolittle, 341 F.Supp. 163 (M.D.Ga.1972); United States v. D'Amato, 340 F.Supp. 1020 (E.D.Pa.1972); United States v. Iannelli, 339 F.Supp. 171 (W.D.Pa.1972); United States v. Aquino, 336 F.Supp. 737 (E.D.Mich.1972); United States v. Cantor, 328 F.Supp. 561 (E.D.Pa. 1971); United States v. LaGorga, 336 F.Supp. 190 (W.D.Pa.1971). Here, Attorney General Mitchell personally authorized this wiretap and, therefore, authorization can be traced to a publicly responsible official, subject to political process. *Cf.* United States v. Robinson, 468 F.2d 189 (5th Cir. 1972); United States v. Narducci, 341 F. Supp. 1107 (E.D.Pa.1972). We hold that on the facts presented in this case, the wiretaps were properly authorized; to hold otherwise would be to put form over substance and would negate the countless hours spent by law enforcement officials gathering evidence for this case. If the statute is constitutional, a request for authorization which has been personally reviewed and granted by the Attorney General complies with requirements of 18 U.S.C. § 2516, even if it incorrectly appears on the court records that Will Wilson was the authorizing officer.

3. The Telephone Toll Records.

[3] The affidavits supporting the wiretap authorizations show that certain telephone company toll records were in the hands of government authorities at the time the affidavits were prepared. Defendants contend that these records were illegally obtained by the government.

At the evidentiary hearing, the government represented to the court that disputed toll records were obtained by Grand Jury subpoena, but could not verify if the records were in fact ever presented to a Grand Jury or used for any other reason except to facilitate the government's investigation. The government was ordered to inform the court if these records were ever presented to the Grand Jury (Tr., p. 304). In response to this order, the court was supplied with a memorandum from the office of the United States Attorney for the Western District of Pennsylvania entitled "Obtaining Telephone Toll Slips from the Bell Telephone Company of Western Pennsylvania et al." and copies of subpoenas for the toll records involved in this case. The procedure outlined in this memorandum as follows:

The investigating officer makes known to the United States Attorney's office the telephone numbers for which toll slips are desired, and that office prepares a subpoena duces tecum ordering the appropriate telephone company official to appear with these records before the next Grand Jury; this subpoena is served by the Marshal. Rather than waiting for the next Grand Jury, the telephone company immediately supplies the requested information to the United States Attorney's office, which then turns the information over to the officer requesting it. The last paragraph of the memorandum provides:

> "The main purpose in devising the above procedure is to regularize the obtaining of toll slips so that any doubt about the propriety of such action be removed. In other words, the subpoena to the grand jury of telephone toll slips will be handled henceforth in the same way as the subpoena of any other books, records etc., and, it is recognized, the telephone company has the right at any time to refuse to divulge these records except to the grand jury per the terms of the subpoena. *The above procedure has been approved by the telephone company as a means of accommodation to federal investigative efforts*" (Emphasis supplied.)

According to this memorandum the telephone company realizes when it produces these records that it is not legally bound to do so; that it can wait until the next Grand Jury; and that if it produces the records to the United States Attorney's office instead of the next Grand Jury, it is doing so voluntarily. Of course, since these assertions are contained in a unilateral and unverified memorandum, it would require the taking of further evidence before a decision could be based on these grounds, but for the following reasons we believe the taking of further evidence to be unnecessary.

[4] First, contrary to the defendants' contentions, these toll records are not covered by the Federal Communications Act of 1934, 47 U.S.C. § 605, as amended, Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351 (June 19, 1968). While some courts have assumed, without deciding, that toll records are covered by § 605 and, therefore, producible only "in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority", Nolan v. United States, 423 F.2d 1031 (10th Cir. 1969); DiPiazza v. United States, 415 F.2d 99 (6th Cir. 1969), we believe the correct view is expressed

in United States v. Covello, 410 F.2d 536 (2d Cir. 1969), where it was held at page 542:

> "• • • [T]he keeping of toll records is a necessary part of the ordinary course of the telephone company's business and is necessary in order that the company may substantiate its charges to its customers. Toll records are kept for all telephone subscribers and are not kept just for subscribers being investigated by officers of the law, or ones suspected of criminal proclivities. The subscriber is fully aware that such records will be made, United States v. Gallo, 123 F.2d 229, 231 (2 Cir. 1941), and the records of the telephone company so kept in the ordinary course of the company's business are entitled to the same evidentiary treatment as the records of other businesses. See Federal Business Records Act, 28 U.S.C. § 1732 (1964). Section 605 was not designed to render evidentially inadmissible the records made in the ordinary course of the telephone company's business and which are essential to the ordinary operation of that business."

The defendants have no proprietary interest in records kept by the telephone company reflecting transactions occurring between the defendants and the company. *Cf.* Donaldson v. United States, 400 U.S. 517, 523, 91 S.Ct. 534, 27 L.Ed.2d 580 (1970). Therefore, even if further evidence was taken, and it was found that the manner in which these records were obtained by the government was an abuse of process amounting to an illegal search and seizure,[5] any search which occurred was directed against

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[5] See: Durbin v. United States, 94 U.S. App.D.C. 415, 221 F.2d 520 (1954). *Cf. In Re* Aviation Industry, 183 F.Supp. 374 (S.D.N.Y. 1960). For other cases dealing with the use of a subpoena *duces tecum* by the United States Attorney's office, see: Martin v. Beto, 397 F.2d 741 (5th Cir. 1968); United States v. Aronson, 319 F.2d 48 (2d Cir. 1963); United States v. Re, 313 F.Supp. 442 (S.D.N.Y.1970); *In Re* Dymo Industries, Inc., 300 F.Supp. 532 (N.D.Cal.1969); United States v. Morton Salt Company, 216 F.Supp. 250 (D.C.Minn.1962).

(Footnote continued on following page)

the telephone company and not these defendants, and what the Supreme Court said in Alderman v. United States (1968), 394 U.S. 165, at page 174, 89 S.Ct. 961, at page 967, 22 L.Ed.2d 176, would be applicable here:

> "What petitioners appear to assert is an independent constitutional right of their own to exclude relevant and probative evidence because it was seized from another in violation of the Fourth Amendment. But we think there is a substantial difference for constitutional purposes between preventing the incrimination of a defendant through the very evidence illegally seized from him and suppressing evidence on the motion of a party who cannot claim this predicate for exclusion.
>
> "* * * [W]e are not convinced that the additional benefits of extending the exclusionary rule * * * would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."

We conclude that since these records were telephone company records, the defendants have no standing to complain of the manner in which the government acquired access to them or to their use in establishing probable cause for the court authorized wiretaps.[6] *Cf.* Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); Boyle v. United States, 395 F.2d 413 (9th Cir. 1968); Dryden v. United States, 391 F. 2d 214 (5th Cir. 1968); Hill v. United States, 374 F.2d 871 (9th Cir. 1967); United States v. Re, 372 F.2d 641, 644 (2d Cir. 1967).

(Footnote continued from preceding page)
The problem apparently is one for disciplinary action by the court and not one entitling a defendant to suppress evidence. United States v. Procario, 356 F.2d 614, 618 (2d Cir. 1966).

[6] While we have decided that these records were not covered by 47 U.S.C. § 605, even if they were, the defendants still might not be entitled to have this evidence suppressed. See: Goldstein v. United States, 316 U.S. 114, 122, 62 S.Ct. 1000, 86 L.Ed. 1312 (1942).

4. Probable Cause.

[5] The wiretaps involved in this case were authorized by three separate applications to the court (Misc. Nos. 5127, 5147, and 5191), each containing the affidavit of Special Agent Robert L. Burton; these three affidavits run for a total of 68 pages. We have reviewed the affidavits and conclude that, contrary to defendants' contentions, they are sufficient to establish probable cause for the issuance of interception orders as to all defendants named in this indictment.

The affidavits in this case are based upon three sources of information: (1) toll slips, (2) other wiretaps, and (3) confidential informants. We have already decided that the defendants do not have standing to object to the use of the toll slip information and nothing appears on the record which shows that information discovered by the use of prior wiretaps was tainted or objectionable as far as these defendants are concerned. See: Alderman v. United States, *supra*. As to the confidential informants, the affidavits indicate why the informants are credible and the information supplied reliable, and further set forth the underlying circumstances necessary to enable the judge authorizing the wiretap to pass on the validity of the informants' conclusions and to find a substantial basis for crediting the informants' information. United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L. Ed.2d 637 (1968). The affidavits in this case contain ample information to allow a finding of probable cause.

5. Search of the Stanizzo Residence.

Patsy Stanizzo and Betty Howden Stanizzo have moved to suppress as evidence and return to them certain items seized from their residence by F.B.I. agents on July 12, 1971. They contend that while the officers were armed with a search warrant, the affidavit for the search warrant does not set forth probable cause because it is based upon facts occurring long prior to the search, and further that $1900 in cash seized by the officers was not such an integral part of any gambling operation so as to be of evidential value at trial, and, accordingly, should be returned to them.

[6] The search warrant for the Stanizzo residence was issued on July 11, 1971, and executed on July 12, 1971. Five pages of the fifty-one page affidavit of Special Agent Burton set out the probable cause for the issuance of a search warrant for the Stanizzo residence. This portion of the affidavit shows that there was probable cause to believe that the Stanizzos operated a gambling business from June, 1970, to May, 1971, and it also sets out that as recently as July 8, 1971, a confidential informant verified that by reason of his personal gambling activities he knew that the Stanizzos continued to operate a gambling business. In our view, the information supplied by the confidential informant updated the earlier information and the affidavit sets out probable cause for the issuance of the search warrant on July 11, 1971. *Cf.* United States v. Harris, *supra.*

Defendants also contend that $1900 in cash seized from a bedroom dresser should be returned to them because there is no evidence showing it was an integral part of a gambling business, citing Commonwealth v. Blythe, 178 Pa. Super.

575, 115 A.2d 906 (1955), a case involving a public Bingo game.

[7] At the evidentiary hearing it was disclosed to the court that the Internal Revenue Service had filed a lien against this money (Tr., p. 236). Accordingly, a determination of whether this money should be returned to the Stanizzos, forfeited under 18 U.S.C. § 1955(d) or turned over to the Internal Revenue Service is premature at this time. The motion to return will be denied.

6. Constitutionality of 18 U.S.C. § 1955.

[8] Defendants allege that the illegal gambling business statute, 18 U.S.C. § 1955, is unconstitutional. On May 9, 1972, after briefs had been submitted and oral argument had in this case, the Third Circuit Court of Appeals upheld the constitutionality of 18 U.S.C. § 1955 in the case of United States v. Riehl (Appeal of Rinaldi), 460 F.2d 454 (3d Cir. 1972). We hold defendants' contentions in this regard fail on the basis of the above cited decision.

7. The Application of Wharton's Rule to the Indictment.

In Count One of the indictment, defendants are charged with conspiring to violate 18 U.S.C. § 1955 and thereby violating 18 U.S.C. § 371, and in Count Two they are charged with actually conducting an illegal gambling business and thereby committing substantive violations of 18 U.S.C. § 1955. The defendants contend that a conviction on both counts cannot stand because it would be a duplication of punishment and, accordingly, count one, the conspiracy count, should be dismissed. Defendants rely on United States v. Greenberg, 334 F.Supp. 1092 (N.D.Ohio 1971).

These contentions are based on the definition of "illegal gambling business" found in § 1955:

> "(1) 'illegal gambling business' means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) *involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and*
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C. § 1955(b). (Emphasis supplied.)

[9-11] One of the purposes of the general conspiracy statute, 18 U.S.C. § 371, is to punish concerted action involving a plurality of actors which makes crime easier to perpetrate and harder to detect. United States v. Rabinowich, 238 U.S. 78, 88, 35 S.Ct. 682, 59 L.Ed. 1211 (1915). But, by virtue of the definition of illegal gambling business in § 1955, *supra*, it is a prerequisite that the concerted action of five *or more* persons be involved before a federal crime has been committed. It follows that if a substantive violation of § 1955 is proved, the same concerted action proving this violation cannot be used to automatically convict the defendants of conspiracy under 18 U.S.C. § 371 because, in this context, the conspiracy violation does not require proof of a fact which was not also essential to the proof of the § 1955 violation, i. e., there would be no additional element in the proof of the conspiracy to which the additional punishment could attach.[7] *Cf.* Pereira v. United

[7] For cases discussing Wharton's rule see: Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946); Gebardi v. United States, 287 U.S. 112, 121-122, 53 S.Ct. 35, 77 L.Ed. 206 (1932); Baker v. United States, 393 F.2d 604 (9th Cir. 1968); Reno v. United * * *

States, 347 U.S. 1, 9, 74 S.Ct. 358, 98 L.Ed. 435 (1954); United States v. Beacon Brass Co., 344 U.S. 43, 45, 73 S.Ct. 77, 97 L.Ed. 61 (1952); American Tobacco Co. v. United States, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); United States v. Noveck, 273 U.S. 202, 206, 47 S.Ct. 341, 71 L.Ed. 610 (1927); Gavieres v. United States, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911).

[12-14] But, assuming the above to be correct, this does not mean that defendants are entitled to have the conspiracy count dismissed. The general conspiracy statute, 18 U.S.C. § 371, can punish conspiratorial conduct which does not amount to a substantive violation of 18 U.S.C. § 1955. As was said in United States v. Riehl (Appeal of Rinaldi), *supra*, 460 F.2d p. 460, in discussing a § 1955 gambling business:

> "It seems clear that one may conspire to facilitate such a business * * * and at the same time be so removed from its operation so as to fall outside the reach of § 1955."

Absent a clear legislative intent to the contrary, we believe that persons conspiring with the members of an established illegal gambling business as defined by 18 U.S.C. § 1955 and committing an overt act not amounting to a substantive violation of § 1955, but facilitating such a business or aimed at eventual criminal participation therein, can be held responsible under the general conspiracy statute, 18 U.S.C. § 371. *Cf.* Woods v. United States, 99 U.S. App. D.C. 351, 240 F.2d 37 (1956); Lisansky v. United States, 31 F.2d 846 (4th Cir. 1929); see: Annot., 91 A.L.R.2d 1148 (1963). Defendants' motions will be denied.

An appropriate order will be entered.

United States District Court for the Western District of Pennsylvania, Memorandum and Order Dated January 26, 1973

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, JEANNE KOSH, PATSY STANIZZO, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANINE DENHAM, JAMES QUAY, FRANK DELUCIA.

Criminal No. 71-254.

MEMORANDUM AND ORDER.

MARSH, *Chief Judge.*

During the trial of this case, two unindicted co-conspirators, Doreen Kohne and Jacquelyn "Jackie" Woods, objected to the introduction into evidence of electronic recordings of conversations in which they were parties. It appearing that these unindicted co-conspirators were "aggrieved person[s]" under 18 U.S.C. § 2510(11) and, as such, had standing to move to suppress these interceptions under 18 U.S.C. § 2518(10)(a), the government was

ordered to deliver a copy of the Applications and Court Orders for these interceptions to them and they were given 10 days to present a motion to suppress.[1] On January 23, 1973, a motion to suppress was filed on behalf of these individuals and on January 25, 1973, an evidentiary hearing was held.

The main thrust of the present motion is that the affidavit of Special Agent Burton, attached to the Application to intercept conversations on Doreen Kohne's telephone, violates the principles announced in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), because the information contained therein concerning confidential informants is inadequate. This court ruled against this contention in *United States v. Kohne*, 347 F. Supp. 1178, 1184 (W.D. Pa. 1972), and while the unindicted co-conspirators make a stronger attack on the affidavits than was previously made, we believe the earlier ruling to be correct and the motion should be denied.

Agent Burton's affidavit incorporates information received from seven confidential informants. As to each of the seven informants the affidavit sets out some of the circumstances from which Agent Burton concluded that they were credible and their information reliable, thereby

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[1] This is a protracted trial and the tapes involving these particular unindicted co-conspirators were not scheduled to be played until after the suppression motion was ruled upon. These individuals had been served with Inventories as early as August 21, 1971, and since such time have been on actual notice that their conversations were intercepted; in other circumstances, we would not be inclined to hear such an untimely complaint. *Cf.* United States v. Wolk, 466 F. 2d 1143 (8th Cir. 1972).

meeting half of the *Aguilar* test.[2] Three of the confidential informants[3] set out as the underlying circumstances for their conclusions either personal conversations with William Kohne or overheard conversations of Kohne with others; this meets the second half of the *Aguilar* test. As to these three informants, *Aguilar* is totally satisfied.

The remaining four informants[4] base their information on conversations with persons engaged in gambling activities; movants assert that this is hearsay on hearsay and cannot be considered in determining probable cause. But, to the contrary, under *Spinelli* this information is to be evaluated with other information in the affidavit, such as the toll slip and informant information which meets the *Aguilar* standards, to determine if it is corroborated and gives additional weight to the allegations in the affidavit. In our view, when the information supplied by these informants is so evaluated and the affidavit considered as a whole, it provides ample probable cause for the issuance of the wiretap order. See: *United States v. McNally*, ____ F. 2d ____ (3d Cir. 1/15/73); *United States v. Kleve*, 465 F. 2d 187 (8th Cir. 1972).

The motion will be denied. An appropriate order will be entered.

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[2] This requirement was met in various ways; some informants had supplied previous information which the F. B. I. had corroborated by independent investigation, others had provided previous information that actually resulted in arrests and convictions. In addition, several informants made declarations against their penal interest. *Cf.* United States v. Harris, 403 U.S. 573 (1971).

[3] These are referred to in the affidavit as informants one, two and four.

[4] These are referred to in the affidavit as informants three, five, six and seven.

Memorandum and Order Dated January 26, 1973

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

WILLIAM PAUL KOHNE, *et al.*

Criminal No. 71-254

ORDER OF COURT

AND NOW, to-wit, this 26th day of January, 1973, it appearing to the court that on August 12, 1971, an Inventory was served by the United States Marshal upon the unindicted co-conspirators, Doreen Kohne and Jacquelyn "Jackie" Woods; and it further appearing that on January 16, 1973, in Open Court, Assistant United States Attorney, Samuel J. Orr, III handed copies of the Authorization and Court Order at Miscellaneous No. 5127 to the above-named unindicted co-conspirators; and it further appearing that on January 23, 1973, said unindicted co-conspirators, Doreen Kohne and Jacquelyn "Jackie" Woods, filed a Motion to Suppress Evidence; after evidentiary hearing and upon due consideration of the oral

arguments of counsel, IT IS ORDERED, ADJUDGED AND DECREED that said Motion to Suppress Evidence be and the same hereby is denied.

RABE F. MARSH,
United States District Judge.

cc:

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Memorandum and Order Dated January 26, 1973

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Prosecutor,

vs.

WILLIAM PAUL KOHNE, *et al.*,
Defendants.

No. 71-254 Criminal

MOTION TO SUPPRESS EVIDENCE

AND NOW, comes the parties, Jackie Woods and Doreen Kohne, by their counsel, John L. Doherty, Esquire, and move this Honorable Court to suppress the evidence in the above action, and respectfully represents the following:

1. On or about February, 1971, the above parties were searched by means of a telephonic interception.

2. The aforementioned search was not incident to a lawful arrest of the above named parties.

3. The aforementioned search was not with the consent of the above named parties.

4. That the oral communications were unlawfully intercepted and/or the letter of authorization or approval was improper and such impropriety was withheld from the Court by the United States Government.

5. That the oral communications were unlawfully intercepted and/or the order of authorization or approval under which it was intercepted is insufficient on its face in that there was not sufficient probable cause to issue such an order or authorization and that the interception and requirements of Title 18, Section 2518, under which the Government gained its power to intercept was violated by the Government.

6. That the Government misled the Court as to probable cause and need requirements so that it could pursue its course of selective prosecution.

7. That these parties were severely prejudiced in that the Government wilfully violated Title 18, Section 2518, *et seq.*, and thus these parties rights to privacy were violated.

8. That the parties' rights guaranteed by the Fourth Amendment of the United States Constitution were violated in that they were subjected to an unreasonable seizure.

9. That the law under which the Government gained its power to intercept the oral communication are violative of the parties' Constitutional rights under the First, Fifth and Sixth Amendments to the United States Constitution.

WHEREFORE, the parties pray that your Honorable Court order an evidentiary hearing and further order that the illegally seized conversations be suppressed and not used in any criminal or civil proceeding.

Respectfully submitted,

JOHN L. DOHERTY, ESQUIRE,
Attorney for Defendants.

United States District Court for the Western District of Pennsylvania, Opinion of April 23, 1973: United States v. Kohne, 358 F. Supp. 1046 (W.D. Pa. 1973)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, JEANNE KOSH, PATSY STANIZZO, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANINE DENHAM, JAMES QUAY, FRANK DELUCIA.

Criminal No. 71-254

OPINION AND ORDER

MARSH, *Chief Judge.*

After a protracted criminal trial of five and one-half weeks, the jury in the above case returned verdicts which found the defendants, William Paul Kohne, Paul Patrick Woods, Patsy Stanizzo, Betty Howden Stanizzo, Joseph Tabella, Patrick Denham, Jeanine Denham and Frank DeLucia, not guilty of Count 1, conspiracy, and guilty of Count 2, violating the federal gambling statute, Title 18 U.S.C. § 1955.

The jury retired to deliberate at 1:10 p. m. on Tuesday, February 13, 1973, and returned the verdicts on Wednesday, February 14th, at approximately 4:30 p. m., after spending the night at the William Penn Hotel in Pittsburgh.

On Monday, February 19, 1973, Steve Tisak, No. 10 juror, went to the law office of James A. Ashton, Esq., where he met with three defense counsel, including Attorney Ashton, who represented William Paul Kohne, the owner of the alleged illegal gambling business, and defendants, Patrick and Jeanine Denham. There he signed a written question and answer statement in which he repented joining in the verdicts of guilty and complained about the words and actions of some other jurors, the hotel "cots", and worry over an erratic oil heater in his home.

On February 20, 1973, the defendants, William Paul Kohne, Patrick Denham and Jeanine Denham, filed a motion for mistrial alleging that Mr. Tisak rendered guilty verdicts because he "was coerced by threats of physical harm that he felt were real." Mr. Tisak's unsworn statement was attached. In their motion for mistrial, the moving defendants requested "that an evidentiary hearing be held by this Court to determine all facts which are germane to the issues raised by this petition, subject to the right of examination and cross-examination by all affected parties."

All defendants have filed motions for a new trial. All defendants, except Pasty Stanizzo and Betty Howden Stanizzo, alleged as one of the reasons for a new trial that juror No. 10 was coerced into finding the defendants guilty

of Count 2. Defendants, Patsy Stanizzo and Betty Howden Stanizzo, alleged in their motion that the verdicts of the jury might have been the result of a compromise or of some type of coercion brought on by the inadequate accommodations the jurors had during their overnight sequestration. Defendant Tabella alleged that since "the jurors were made to sleep ten in one room overnight", such an atmosphere was not conducive to a fair and impartial trial.

The William Penn Hotel is one of Pittsburgh's leading hotels where, to my knowledge, many juries have been sequestered overnight during the past 20 years. Five juries have spent the night in that hotel so far this year. I have not heard of any prior complaints about the accommodations. Even if the "cots" were not entirely to Tisak's liking, I find that the accommodations were adequate. (See: Exhibits 2, 3.)

Obviously, there is nothing in Tisak's written statement which would warrant impeachment of the verdicts. He does not assert that he was "coerced" into rendering the guilty verdicts. His predominant concerns were the performance of the oil heater at his home and the prospect of spending another night on a "cot" in a room with eight other exasperated male jurors. But because there was innuendo of threats of bodily harm, with considerable reluctance, I granted the request for a hearing to determine if there were genuine attempts to inflict bodily harm upon Tisak, or threats which actually put him in fear of bodily harm. *Cf. United States v. Grieco*, 261 F. 2d 414, 415 (2d Cir. 1958).

All counsel were notified; four defense attorneys attended the hearing as well as the Assistant United States Attorney.

who prosecuted the case.[1] Several defendants were present. Juror, Steve Tisak, was present and was examined by me at some length. Counsel for the government and counsel for the defendants who were present were not permitted to cross-examine Tisak. *United States v. Grieco, supra,* pp. 414-415. However, all counsel who were present were given the opportunity to suggest additional questions that they desired me to put to Tisak. No specific question was suggested.

Three of the jury attendants, a Marshal, Mr. Ray Eschman, my law clerk, Mr. James West, and the court-crier in attendance, Mr. William Ellis,[2] were also questioned by me. Counsel for the defendants were given the opportunity to examine these witnesses. Counsel for the defendants questioned Mr. Ellis; no questions were asked of either Mr. West or Mr. Eschman.

From the testimony taken, I find the following facts:

Steve Tisak was seated as juror No. 10 and served the entire duration of the trial. Tisak wrote and sent three communications to me; one during the course of the trial and two on February 14th, while the jury was deliberating. Tisak is not a frail man; he is 5′ 8″ in height, weighs 150 pounds, and is a truck driver and construction worker. From his appearance and demeanor, he did not appear to be a "weak sister" or a "shrinking violet" who would easily be intimidated by threats. On the contrary, he seemed to be endowed with the characteristics of an individualist and a worthy opponent for his 11 peers in the advocacy of his

[1] Attorney Ashton did not attend due to the death of his father.

[2] Mr. West and Mr. Ellis and the Marshal were sworn to safeguard the jury.

positions. His will was not overborne by threats of violence; to the contrary, his mind was changed in the heat of deliberations and shortly after my response to his last written question.[3] I gathered from his testimony that he was greatly concerned about being sequestered because of a problem that he was having with an oil heater in his home. He testified that he was not allowed to make a call to have someone check his heater. Pursuant to Tisak's written instructions (Exhibit 1), Mr. West made a call to Andrew Yanchik at 8:30 p.m. on February 13th to inform him that Tisak would be detained overnight. Tisak testified that he had previously arranged with Mr. Yanchik to feed his dogs if he was detained overnight. Tisak recalled writing the message and giving it to Mr. West, but erroneously thought it took place at 5:30 in the afternoon. Late that evening at the hotel, Tisak requested Mr. Ellis to make another call concerning his car which he had parked in Aliquippa that morning, but this request was refused because Ellis felt he could not leave the jurors unattended to make the call, and Tisak did not seem to be overly concerned. *No mention was made of the oil heater to either West or Ellis.*

Tisak also testified that at the conclusion of the charge, he remembered that I inquired whether any juror was unable to stay overnight if such became necessary. In response to that inquiry, Mrs. Csurilla, a juror, stated she could not stay overnight because she had two children at home with no one to care for them, and she was excused, but Mr. Tisak did not mention that the oil heater constituted a danger to his home.

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[3] The jury returned unanimous verdicts within 11 minutes after my response to Tisak's last question.

In his statement Tisak described the threats as follows:

> "• • • Other jurors said they did not intend to sleep on them cots again. One [juror] stated if he has to sleep there again he will be in Federal Court in the morning for murder. Through the day two jurors acted in such a manner that I thought they would pick up a chair and break it on my head because I would not vote blank [*sic*] guilty charges. Now, I finally voted guilty on a [*sic*] gambling charges because it was admitted in Court that gambling was performed. • • • I signed guilty on that blank [*sic*] charges because I myself did not want to sleep at the hotel with those people because I did not think I would have walked out of that place the next day after sleeping on those cots. • • • [O]ne juror stated Wednesday, 'I do not get mad, I just get even.'"

Tisak testified that the alleged threats occurred on Wednesday, February 14th, in the jury room, but Mr. Ellis and the Marshal in attendance stated that Tisak did not inform them at any time about any threats that were being made against him.

At the hearing Tisak testified that one juror acted very nervous and grabbed the back of his chair, and one juror stood up flexing his muscles. But he also testified that no one picked up a chair and attempted to strike him over the head with it. He admitted that no one so much as touched him or attempted to touch him. In connection with Tisak's written statements concerning a juror being in federal court for murder if he had to stay another night, and a juror stating, "I do not get mad, I just get even", he admitted that these assertions were not accompanied by any act or threats of physical violence directed at his person.

Tisak also testified that several jurors were hollering at him and called him, among other things, "an opinionated

ass". He related that several of the jurors told him that if they had to stay another night, they would go bankrupt.

From the testimony of Tisak, it seems obvious that on Wednesday all the jurors favored acquittal of the defendants of Count 1, and 11 jurors favored conviction of the defendants of Count 2. Tisek was the holdout. He testified that he had problems with the effect of the terms "wilfully and knowingly". This problem was a subject of the two communications he sent to the court on Wednesday. February 14th, prior to the return of the verdicts. Tisak knew that he could communicate with the court by writing a message and handing it to the bailiff. This he had done once during the trial and twice during the deliberations. His assertion that he did not know how to communicate the alleged threats is not convincing.

He stated during the hearing that with the problem of his heater troubling him, he thought he might as well give in, sign the verdict slips and go home. In response to my question: "Why didn't you write a note to me and tell me that jurors were threatening you and give it to the bailiff?", Tisak replied: "Sir, about that time all I wanted to do was get out of here and see if my place burnt [*sic*] down or if I was out – – –. All I wanted to do is get out of the place and forget everything."[4]

It was only after he reconsidered over the week-end that he decided to impeach his verdicts and returned on February 19th to the Courthouse, which was closed because it was a holiday, and eventually made his way to Attorney Ashton' office.

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[4] None of the parties ordered the transcript of the hearing. This quotation was read to me by the Official Court Reporter from her notes.

When the jury announced it had arrived at verdicts, and after the verdicts had been announced in open court, the clerk polled the jury and Tisak replied affirmatively that the verdicts as read were his verdicts. He did not complain of threats or fear then in open court or to any other person until five days later.

Assuming that the testimony of Tisak is credible, I conclude that the statements and actions of some of the jurors amounted only to heated expressions of annoyance with Tisak during the second day of deliberations; that the threats were empty ones, expressive of impatience, exasperation and frustration, and did not actually cause Tisak to fear bodily harm, or forcibly compel him to change his vote. The expressions used by some jurors, combined with Tisak's urgent desire to go home because of the erratic heater and the hotel "cot", are not sufficient grounds to impeach the verdicts. Whether or not those expressions and his concern about the heater and the "cot" were effective to induce Tisak to join in the verdicts are not subjects for investigation. Jurors are allowed to testify only as to the nature of outside influences, but not as to the subjective effect of the intrusions upon their mental processes. *Mattox v. United States*, 146 U.S. 140 (1892); Jones, Evidence, Vol. 3, § 20:58, p. 732 (6th ed.).

Based on the evidence, it is my opinion that the motion for mistrial and the motions for a new trial on the grounds of coercion and inadequate hotel accommodations should be denied.

It is generally held that jurors may not impeach their verdict by testimony that it resulted from coercion or

majority vote. See: 8 Moore's Federal Practice ¶ 31.08, pp. 31-55, 31-56; 6A Moore's Federal Practice ¶ 59.08[4], p. 3796; Jones, Evidence, Vol. 3, § 20:58, p. 727 (6th ed.); 8 Wigmore, Evidence, §§ 2345-2356 (1961); Wright, Federal Practice and Procedure § 554, pp. 493-494.

The Proposed Rules of Evidence for United States District Courts and Magistrates, Rule 606(b), provides as follows:

> "(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, *a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations* or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received." (Emphasis supplied.)

The Advisory Committee's Note states, *inter alia,* that to allow inquiry into the mental operations and emotional reactions of jurors would place every verdict at the mercy of jurors and invite tampering and harassment; substantial authority refuses to allow a juror to disclose *irregularities which occur in the jury room.*

The American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft, Trial by Jury, § 5.7, provides:

"5.7 Impeachment of the verdict.

"(a) Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined."

The commentary to the section states that about two thirds of the states take the strict view that a juror is incompetent to testify concerning his verdict under any circumstances.

An example set forth in the commentary observes that a juror would not be permitted to testify that he was induced to agree to a verdict because his wife was ill and he was anxious to get home. Thus it would seem that if Tisak agreed to verdicts because he was concerned about his erratic oil heater, or his dogs and cat, or the conduct or statements of other jurors, and was anxious to get home, such would be insufficient to impeach the verdicts.

Many states follow the rule formulated by Lord Mansfield, *Vaise v. Delaval,* 1 Term R. 11 (K.B. 1785), to the effect that the testimony of a juror cannot be used to impeach a verdict, even though the jury's conduct otherwise proved would require a new trial. However, it seems established that the more liberal federal view permits testimony of a juror pertaining to outside influences. *Mattox v. United States, supra; United States v. Kum Seng Seo,* 300 F. 2d 623 (3d Cir. 1962); *Richardson v. United States,* 360 F. 2d 366 (5th Cir. 1966); 2 Wright, Federal Practice and Procedure, Criminal § 554, pp. 488-492. See also, *State v. Kociolek,* 118 A. 2d 812, 20 N. J. 92 (1955) (Brennan, J.). In the case *sub judice* there were no elements of jury mis-

conduct such as extraneous influence upon the jury within or outside the jury room: *i.e.*, no evidence of prejudicial newspapers being introduced into the jury room, or unauthorized statements of bailiffs made to the jury or a juror, or a witness conversing with a juror.

Hyde v. United States, 225 U.S. 347, 382-384 (1912), presented a situation, on a motion for a new trial, where it was contended that the conviction of two of the defendants and the acquittal of two of the defendants was the result of an illegal agreement among the jurors fostered by what amounted to coercion by the Court. It was held:

> "• • • [T]hat the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors and can receive no corroboration."

In *McDonald v. Pless*, 238 U.S. 264, 267 (1915), on motion for a new trial, a juror was not permitted to testify on the ground that a juror was incompetent to impeach his own verdict. The Court cited *Hyde v. United States, supra*, and stated:

> "For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room."

In *Johnson v. Hunter,* 144 F. 2d 565 (10th Cir. 1944), the Court affirmed the denial of a state prisoner's petition for *habeas corpus.* The Court observed that petitioner's allegation that one negro juror was intimidated by 11 white jurors would, if true, invalidate the verdict. Without holding a hearing, the Court observed the fact of intimidation probably could not be proved since the necessary witness would be the negro juror who could not testify because of the general rule that evidence of jurors is not admissible to impeach their verdict.

In *United States v. Grieco, supra,* a female juror wrote to the trial judge stating that she wanted to vote for acquittal but a male juror was "very abusive", so much so that she was "shaken and crying" when she finally agreed to concur with the rest, and that she now wished "to retract". A hearing was held; the judge examined the juror; refused to permit the defendant's attorney to examine the juror; and denied the motion for a new trial. The Court of Appeals affirmed, stating:

> "We do not say that there can be no threats short of violence by one juror against a recalcitrant dissenter that will upset a verdict, but certainly there was nothing in the case at bar to justify such action. So far as appears, it was only the blustering arrogance of her fellow that so agitated the juror that, after she had later had time to reflect, she concluded that she had not voluntarily concurred in the verdict."

In *People v. Van Camp,* 97 N.W. 2d 726, 730-731, 356 Mich. 593 (1959), the male jurors pressured and intimidated a female juror into joining in a guilty verdict. It was held that such evidence did not meet the test in *Mattox v. United States, supra.*

In *Parsons v. United States,* 188 F. 2d 878, 879 (5th Cir. 1951), the defendant was convicted of receiving a stolen automobile. The Court said:

> "Another [ground for a new trial] is the claimed misconduct of the jury, as attempted to be shown by the impeaching affidavit of one of the jurors as to matters said and done in the jury room.
>
> "It is too well settled for argument or discussion that in the federal system jurors will not be heard to impeach their verdict by affidavits or testimony as to the manner of arriving at it."

In *People v. Zelver,* 287 P. 2d 183 (Calif. 1955), sentence was imposed on two counts of felony. The Court of Appeals affirmed the conviction, stating at pages 188-189:

> "On motion for a new trial, the defendant presented the affidavit of the juror, Myrtle Strong, to the effect that she had been 'coerced' and 'intimidated' into voting for a verdict by insulting and abusive language used to her by other members of the jury. The trial court rejected the affidavit, and properly so. The rule that a juror cannot impeach his own verdict except in the single case of a verdict arrived at by chance or lot is too well entrenched to be now challenged. [Citations omitted.]"

In *Commonwealth v. Patrick,* 206 A. 2d 295, 297, 416 Pa. 437 (1965), it was held that the verdict of the jury cannot be impeached by the affidavit of one juror alleging coercion by the other jurors. The Court stated:

> "Our Courts have repeatedly held for over 150 years that after a verdict is recorded, and after the jury has separated and been discharged, jurors may not invalidate or impeach a verdict by their own testimony."

Cf. Brinsfield v. Howeth, 72 Atl. 289, 110 Md. 520 (1909).

The state of the law on the problem of post-trial communications with jurors is uncertain and conflicting.[5] Inasmuch as there was no independent evidence of juror misconduct, and no evidence of outside influences, and since I find that juror Tisak was not compelled to join in the verdicts of guilty by violence or intimidation, his written statement and testimony, even if true, are insufficient to impeach the verdicts. Moreover, from his testimony, the cause or causes responsible for his joining the majority is a matter of sheer speculation. It might have been because he feared his house might burn down; he might have been influenced by my answer to his final question, or by the arguments of his fellow jurors, or by their heated expressions and impatient conduct in the jury room; he might have been influenced by the prospect of spending another night on a "cot" in the hotel; he might have joined in the verdicts out of weariness, a sense of frustration or futility, or an overriding desire to get home. His capitulation might have resulted from a combination of the foregoing and other undisclosed motivating factors, but under the law his subjective reasons for joining in the verdicts are inadmissible.

An appropriate order will be entered.

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[5] April, 1972 Report of the Committee on Operation of the Jury System to the Judicial Conference of the United States, Appendix B, p. 38. See: *"City of Miami v. Bopp,* 117 Fla. 532, 158 So. 89 (1934) Miami Supreme Court—Opinion by Justice Buford" and *"People v. McNaspie,* 261 App. Div. 657, 27 NYS 2d 906 (1941) New York Supreme Court, Appellant [*sic*] Division, Opinion by Presiding Justice Hill" cited by defendant Kohne.

ORDER OF COURT

AND NOW, to-wit, this 23d day of April, 1973, after hearing, and upon due consideration of the briefs submitted, IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Mistrial filed on behalf of the defendants, William Paul Kohne, Patrick Denham and Jeanine Denham, and the Motions for a New Trial filed by all the defendants for the reasons that the overnight accommodations of the jury were inadequate and that juror Tisak's verdicts of guilty were coerced be and the same hereby are denied.

RABE F. MARSH,
United States District Judge.

cc:

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United States District Court for the Western District of Pennsylvania, Opinion and Order Dated April 24, 1973

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, JEANNE KOSH, PATSY STANIZZO, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANINE DENHAM, JAMES QUAY, FRANK DeLUCIA.

Criminal Action No. 71-254.

OPINION AND ORDER.

The defendants, Patsy Stanizzo and Betty Howden Stanizzo, along with other individuals, were indicted in a two-count indictment charging a conspiracy to violate 18 U.S.C. § 1955 in violation of 18 U.S.C. § 371 (count one), and the substantive violation of 18 U.S.C. § 1955 (count two). After a five and one-half week jury trial, at which the government presented evidence gathered via court-authorized wiretaps, the Stanizzos were found not guilty of conspiracy and guilty of the substantive violation of 18 U.S.C. § 1955.

The Stanizzos timely moved for judgments of acquittal and, in the alternative, for a new trial.[1] After considering the evidence in this case, and the law applicable thereto, we believe the Stanizzos' motion for judgments of acquittal must be granted.

The statute under which the Stanizzos were convicted, 81 U.S.C. § 1955, makes it a federal felony to conduct, finance, manage, supervise, direct, or own all or part of a certain type of gambling business. To fall within the ambit of this statute, 18 U.S.C. § 1955(b)(1) requires the gambling business be one which:

> "(i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

It was the government's theory as shown by the indictment, the bill of particulars, and the closing argument, that Patsy and Betty Stanizzo "conducted" an illegal gambling business which was managed, financed, supervised, directed and owned by William Paul Kohne. This theory was the only one presented to the jury by the charge. Ac-

[1] One of the main bases for the Stanizzos' motion for a new trial is that this court erred in admitting into evidence conversations which violated the marital privilege rule. Since counsel for the Stanizzos so strenuously pressed this objection, we call his attention to a recent case, United States v. Kahn, 471 F. 2d 191 (7th Cir. 1973), which holds that the marital privilege has no application under the circumstances presented in this case.

cordingly, assuming *arguendo,* that Kohne owned and operated a gambling business proscribed by 18 U.S.C. § 1955, the only issue raised here is whether the government has proved beyond a reasonable doubt that Patsy and Betty Stanizzo "conducted" all or part of Kohne's illegal gambling business. *Cf. Rewis v. United States,* 401 U.S. 808, 814 (1971).

The meaning of the word "conduct" as used in 18 U.S.C. § 1955 has been a fertile source of litigation. *United States v. Ceraso,* 467 F. 2d 653, 656 (3d Cir. 1972); *United States v. Palmer,* 465 F. 2d 697, 699 (6th Cir. 1972); *United States v. Becker,* 461 F. 2d 230, 232 (2d Cir. 1972); *United States v. Riehl,* 460 F. 2d 454, 459 (3d Cir. 1972); *United States v. Harris,* 460 F. 2d 1041, 1049 (5th Cir. 1972). These cases clearly establish that those who are "employed by",[2] "carry on"[3] or "participate in the operation of"[4] an illegal gambling business are within the reach of § 1955.

Since no evidence was presented showing that the Stanizzos were employed by Kohne, under the law, for their conviction to stand, the evidence must at least show that the Stanizzos "carried on" or "participated in the operation of"[5] Kohne's gambling business. The evidence produced at trial relating to the Stanizzos showed the following:

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[2] United States v. Palmer, *supra;* United States v. Harris, *supra.*

[3] United States v. Riehl, *supra.*

[4] United States v. Becker, *supra;* United States v. Ceraso, *supra.*

[5] Webster's New International Dictionary, 2nd Edition, defines participate as: "to have a share in common with others; to partake; share * * *."

On February 7, 1971, Patsy Stanizzo called William Paul Kohne and the following conversation occurred:[6]

> Bill: *"Listen, I don't want to take no business from anybody,* but there's a couple of them guys up there called me, they want to send business here. *I said I don't want to take it, I said that goes to Patsy, you know.*
>
> Patsy: "Yeah, who is it?
>
> Bill: "Well, I'm not going to tell you that because * * *
>
> Patsy: "At least, so I know what the hell, what the hell's wrong.
>
> Bill: "Oh, but ah. * * * They want to use one guy against the other. * * *.
>
> Patsy: "I don't know what they want.
>
> Bill: "No.
>
> Patsy: "They're gettin' good service and everything.
>
> Bill: "Uh?
>
> Patsy: "They're all gettin' good service * * *
>
> Bill: "Well, I don't know what * * * they want then.
>
> Patsy: "That's what I can't understand.
>
> Bill: "I told them, I said, well, *I'd take that business but Pat's got that business and that's where it's going to stay.* He said well we was with you, I said what's that got to do with it. I said well you go back and you stay where you're at, that's all. *I don't want that business. I said when he quits it, I'll take it."*
>
> (Profanity excised and emphasis supplied.)

The only reasonable inference that can be drawn from the quoted conversation is that, while Kohne and Stanizzo were on friendly terms, they were not involved in a jointly owned business. Clearly, this conversation does not support a finding that Stanizzo was "carrying on" or "participating in the operation of" Kohne's business, in fact,

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[6] See: GX 112.

quite the opposite appears to be true. (See also conversation 216.)

Beginning on March 8, 1971, and continuing sporadically to April 3, 1971, several calls were introduced in which Kohne and his admitted employee, Jeanne Kosh, while "laying off" Kohne's numbers bets to Sam Levine, also transmitted bets to Levine for "Betty."[7] It is a reasonable inference that the "Betty" involved was Betty Stanizzo. The bets "laid off" for "Betty" were always kept separate from Kohne's bets and while Kohne's gambling operation could be traced from street level employees to his "lay-off" man, Levine, no evidence was presented showing the origin of the bets "from Betty". This corroborates the earlier conversation between Kohne and Patsy Stanizzo (conversation 14) which showed that the Stanizzos ran a separate, autonomous, numbers operation involving different people than the Kohne operation.

On April 5, 1971, Betty Stanizzo called Sam Levine personally and "laid off" her own bets;[8] thereafter neither Kohne nor Kosh "laid off" bets for "Betty",[9] rather, Betty Stanizzo called Levine personally and "laid off" bets.[10]

Sam Levine, who was called by the government as an immunized witness, testified that he took "lay-off" bets from Kohne, and that occasionally Kohne would give him bets from "Betty". Levine considered and kept the bets from Kohne and those from "Betty" separate and apart,

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[7] See conversations 169 175, 176, 177, 179, 181 and 217.

[8] See conversation 182.

[9] See conversations 183, 185 and 209.

[10] See conversations 184, 186 and 187.

but did testify that since Kohne introduced "Betty" to him he would look to Kohne to be sure that "Betty" paid.

William Paul Kohne testified in his own defense that he had known Patsy Stanizzo for fifteen years, but that Patsy Stanizzo had no interest in his numbers business. Kohne frankly and candidly admitted that he and Kosh would occasionally call in "Betty's" bets to Levine, but explained that this was done solely as a convenience and accommodation to Patsy. Kohne also stated that while he occasionally would attempt to ascertain the winning number from Betty Stanizzo, the only number he would pay off on was the one appearing in the Wall Street Journal; the government's expert agreed that this was the usual practice.

The only other possible connection between the Stanizzo business and the Kohne business consists of several telephone conversations on February 12, and 14, 1971, and three months later, on May 12, and 13, 1971, in which "Betty" spoke to supposed members of the Kohne gambling organization in apparent attempts to determine the correct winning number for those particular days.[11]

On this record we cannot say that the government has proved beyond a reasonable doubt that the Stanizzos "carried on" or "participated in the operation of" the Kohne gambling business. It is clear that Kohne handled his own business exclusively and merely accommodated the Stanizzos by putting them in contact with his "lay-off" man, Sam Levine; that the Stanizzos were not necessary to the Kohne business; that Kohne received no benefit for his accommodation, other than possibly the goodwill of the Stanizzos;

[11] See conversations 71, 72, 87, 207, 210 and 211.

and that, if anything, the Stanizzos were a liability and burden upon Kohne's business. We hold that the temporary arrangement whereby Kohne would gratuitously pass on Stanizzos' lay-off bets to Levine, which lasted less than 30 days and was sporadic at best, is too slender a thread upon which to sustain the Stanizzos' convictions of the federal felony.[12]

Likewise, the fact that Kohne, Kosh, and Betty Stanizzo would sporadically attempt to ascertain the winning number, or clear up ambiguity in the correct winning number, by calling one another does not establish that the Stanizzos were "carrying on" or "participating in the operation of" the Kohne business. We agree that in another context such attempted exchange of information, if continuous, would be circumstantial evidence indicating an individual's involvement or connection with a continuing business enterprise which a jury might consider as evidence of guilt. *United States v. Ceraso, supra.* But, we do not believe that a person *gratuitously* telling another who is engaged in an illegal gambling business the winning number, or attempt-

[12] Of course, if the emphasis were shifted from the Kohne business to the Stanizzo business the evidence indicates that William Kohne, Jeanne Kosh and Sam Levine, during various periods of time, "participated in" and "carried on" the gambling business owned by Patsy and Betty Stanizzo by performing acts which were beneficial and necessary to its operation. But, this does not help the government to support the present conviction because the evidence does not show that the Stanizzo business grossed over $2,000 a day (the bets passed to Levine "for Betty" were quite small), or that the Stanizzo business involved five participants for substantially thirty continuous days. Moreover, this was not the theory of the government's case, nor was it a theory presented to the jury by the charge. Rewis v. United States, 401 U.S. 808, 814 (1971); *Cf.* Stirone v. United States, 361 U.S. 212 (1960).

ing to find it out for him, without more, is sufficient to constitute guilt of the charged felony. Here, in its own case, the government clearly established that two separate and distinct gambling businesses existed. The sporadic attempts at an exchange of information regarding the winning number between these two businesses can only be properly attributed to the parties' knowledge that they were engaged in similar businesses, and it can give rise to no inference that the parties were conducting one joint business. *Cf. United States v. De Cavalcante,* 440 F. 2d 1264 (3d Cir. 1971). In any event, this exchange of information was not necessary to either business because, as the defendants contend and the government concedes, the true winning number is only determined by reference to the Wall Street Journal. In short, the sporadic calls concerning the true winning numbers are explained by the fact that the parties knew that they were engaged in similar businesses, they do not amount to proof upon which a jury could find beyond a reasonable doubt that the Stanizzos were "carrying on" or "participating in the operation of" the Kohne gambling business.[13]

In conclusion, if a more expansive meaning than has already been permitted[14] is put upon the definition of "conduct" as used in 18 U.S.C. § 1955, then guilt by association is the inevitable result. Patsy and Betty Stanizzo owned a gambling business and thereby committed misdemeanors under Pennsylvania law, but we find no evidence to support,

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[13] We need not decide whether such evidence was sufficient to establish that the Stanizzos conspired with Kohne. The jury found against the government on the conspiracy charge.

[14] See cases cited in footnotes 4, 5, and 6.

with reason, the government's contentions that while the Stanizzos were running their own business, they so involved themselves with the Kohne operation as to commit the federal felony. The evidence in this case was derived from court-authorized wiretaps. Accordingly, little was left to the imagination concerning the nature and limits of the Kohne gambling operation. This being so, the government established that two separate and distinct gambling businesses existed; that Kohne merely accommodated the Stanizzos by introducing them to Sam Levine so that they could "lay-off" bets with him; and that the Stanizzos' business was not a part of, or necessary to the Kohne business. A gambling business, as with any other business, must have logical limits. The government failed to prove that the Stanizzos violated the federal law as charged.

An appropriate order will be entered.

ORDER OF COURT.

And Now, to-wit, this 24th day of April, 1973, after oral argument and upon due consideration of the record in this case, It is Ordered, Adjudged and Decreed that the motion for judgments of acquittal by Patsy Stanizzo and Betty Howden Stanizzo be and the same hereby is granted; the verdicts of guilty are set aside and judgments of acquittal are hereby entered in favor of the defendants, Patsy Stanizzo and Betty Howden Stanizzo.

RABE F. MARSH,
United States District Judge.

cc:

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United States District Court for the Western District of Pennsylvania, Opinion of April 25, 1973: United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, JEANNE KOSH, PATSY STANIZZO, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANINE DENHAM, JAMES QUAY, FRANK DELUCIA.

Criminal Action No. 71-254.

OPINION AND ORDER.

MARSH, *Chief Judge.*

The ten original defendants in the above captioned case were charged in a two-count indictment with conspiring to violate the federal statute prohibiting illegal gambling businesses, 18 U.S.C. § 1955, in violation of 18 U.S.C. § 371 (Count one) and with the substantive violation of 18 U.S.C. § 1955 (Count two). Two of the indicted defendants, Jeanne Kosh and James Quay, pleaded guilty to the substantive violation immediately after the jury was

sworn to try this case. After a five and one-half week jury trial, at which the government presented evidence gathered via court-authorized wiretaps, the remaining eight defendants were found guilty of the substantive violation of 18 U.S.C. §1955 and acquitted of the conspiracy.

After the jury's verdict, two of the defendants, Patsy and Betty Stanizzo, moved for and were granted judgments of acquittal for the reasons stated in a separate opinion. The remaining six convicted defendants (William Paul Kohne, Paul Patrick Woods, Joseph Tabella, Patrick Denham, Jeanine Denham, and Frank DeLucia) have filed motions for judgment of acquittal and for a new trial.[1] In our opinion the motions should be denied. We consider *seriatim* the following grounds for a new trial raised by defendants:

(1) The court erred in not suppressing the evidence gathered by wiretaps installed on certain telephones.

(2) The voices of certain defendants were not properly identified and therefore the wiretap conversations were erroneously admitted as evidence against them.

(3) The jury's verdict was inconsistent and a nullity.

(4) The court erred in allowing opinion and expert witness testimony.

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[1] Kohne, the Denhams, Tabella, and DeLucia have moved alternatively for an arrest of judgment, but fail to set forth any grounds cognizable under Rule 33, Fed. R. Crim. P., which governs such motions. Insofar as these defendants have set forth grounds for judgments of acquittal or a new trial in their motions, they have been considered as such.

(5) The court's charge and supplemental instructions were erroneous.

(6) The evidence derived from the search of defendant Tabella's residence should have been suppressed.

(7) The court erred in allowing the trial to continue after two of the defendants pleaded guilty.

(8) The court erred in allowing the jury to view transcripts of the wiretap conversations and to wear earphones while the conversations were played.

Finally, we also consider defendants' contentions that they are entitled to judgments of acquittal because the verdicts are against the weight and sufficiency of the evidence.

ADMISSIBILITY OF WIRETAP EVIDENCE.

Defendants assert and reassert that this court erred in not suppressing the wiretap evidence because:

(1) Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, is unconstitutional;

(2) the affidavits filed in support of the wiretap applications lack probable cause;

(3) defendants' toll records were used illegally in establishing probable cause;

(4) the wiretap application was not properly authorized under 18 U.S.C. § 2516(1);

(5) the wiretap applications fail to show why other investigative techniques would fail as required by 18 U.S.C. § 2518(e);

(6) the government failed to comply with 18 U.S.C. § 2519 requiring reports to be filed with the Administrative Office of the United States Courts;

(7) the government failed to serve copies of the wiretap applications and court orders on all parties at least ten days before trial as required by 18 U.S.C. § 2518(9);

(8) the government presented duplicate tapes, rather than the sealed originals, to the grand jury.

Grounds one through five above were decided adversely to defendants when this court ruled on their pretrial motions, *United States v. Kohne*, 347 F. Supp. 1178 (W.D. Pa. 1972).[2] Ground six is untimely[3] and without merit since the failure to file reports with the Administrative Office of the United States Courts is not one of the specifically enumerated grounds for suppression provided under 18 U.S.C. § 2518(10) (a). Grounds seven and eight were ruled upon at trial and merit brief discussion here.

As alleged by the defendants in ground seven, the government failed to serve the defendants copies of the applications and court orders for the wiretaps involved in this case at least ten days prior to trial as required by 18 U.S.C. § 2518(9). But, defendants do not contend, nor can they, that this was a deliberate bypassing of the requirement of the Act or that they have been prejudiced by this

[2] See also, United States v. Ciamacco, Criminal No. 72-150 (W.D. Pa. 3/9/73), disposing of pretrial motions attacking the same wiretap authorizations involved in this case.

[3] If it were necessary to decide the factual issue raised by this contention, an evidentiary hearing would be required to determine if reports were actually filed. We see no reason why this issue could not have been raised and decided before trial. Rule 12(b)(3), Fed. R. Crim. P.; 8 Moore's Federal Practice—Cipes, Criminal Rules ¶41.08.

failure in any manner. The purpose of 18 U.S.C. § 2518 (9) is to provide a defendant with notice so that he can move to suppress wiretap evidence prior to trial. U.S. Code Cong. and Admin. News, 1968, p. 2195. The defendants in this case did move to suppress the wiretap evidence prior to trial, asserting as one of the grounds therefor that the applications for the court orders authorizing the wiretaps did not set forth probable cause. At the hearing on their motions on March 16, 1972, defendants, by their counsel, extensively cross-examined witnesses using the applications and court orders they now complain were not served on them ten days prior to trial.[4] Furthermore, these documents were offered into evidence as exhibits at this hearing,[5] and prior to the hearing had been public records on file in the Office of the Clerk of Court since January 14, 1972.[6] Since the record clearly establishes that defendants had access to these documents almost one year prior to trial and, in fact, moved to suppress the wiretap evidence because of alleged insufficiencies in them, we find substantial compliance with the statute, and hold that the refusal to suppress the wiretap evidence during the trial was correct. *United States v. Wolk*, 466 F. 2d 1143 (8th Cir. 1972); *cf. United States v. Eastman*, 465 F. 2d 1057 (3d Cir. 1972).

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[4] The transcript of the March 16, 1972, hearing is replete with references by defense counsel to the relevant applications and court orders. See, for example, transcript pp. 35-36, 42, 62-63, 71-72, 83-84, 92-117, 126, etc.

[5] See transcript of the March 16, 1972, hearing, pp. 97-98.

[6] Interestingly two pretrial conferences were held in this case, but defendants did not complain about the failure to serve the applications and court orders until after the jury was sworn and double jeopardy attached.

In ground eight above the defendants moved to suppress the wiretap evidence because the tapes presented to the grand jury were duplicates of the sealed tapes used at trial. The sealing procedure required by 18 U.S.C. § 2518 (8)(a) is aimed at protecting the confidentiality of the tapes and, as a secondary purpose, aids in establishing a chain of custody at trial. *United States v. Cantor*, 470 F. 2d 890, 893 (3d Cir. 1972); *United States v. Poeta*, 455 F. 2d 117, 122 (2d Cir. 1972). But 18 U.S.C. § 2518(8)(a) also specifically provides that duplicate tapes may be made, and 18 U.S.C. § 2517(2) allows law enforcement officers to use duplicate tapes "to the extent such use is appropriate to the proper performance of [their] duties." We believe that it was appropriate under 18 U.S.C. §§ 2517(2), 2518(8)(a) to prepare and present duplicate tapes to the grand jury so that the sealed originals would remain intact for inspection by defendants and use at trial. In our opinion this procedure did not require that all wiretap evidence be suppressed.

Adequacy of the Voice Identification

Defendants, Tabella, Woods, and DeLucia, object to the admission of wiretap recordings of phone conversations against them, contending that their voices were never properly identified so as to establish their participation in these conversations. We disagree.

As to Woods and Tabella, their voices were identified by Special Agents Thompson and Britton, respectively. Also, the evidence showed that the phones that were tapped were located in their residences, and they were referred to by name during both incoming and outgoing calls occurring

on these phones.[7] The identification evidence by the agents, coupled with the strong circumstantial evidence, satisfactorily identified their voices so as to support the jury's findings that they were the participants in the gambling conversations. *United States v. Alper*, 449 F. 2d 1223, 1229 (3d Cir. 1971); *Carbo v. United States*, 314 F. 2d 718, 743 (9th Cir. 1963). Moreover, William Kohne testified in his own defense and implicated Woods and Tabella in his gambling business.

The identification of Frank DeLucia's voice presents a different problem. DeLucia's voice was not identified by any witness and the government relies entirely on circumstantial evidence to support its contention that his is the voice on the recordings; this mode of identification is complicated by the fact that Frank DeLucia's adult son, Frank DeLucia, Jr., allegedly resided with him.[8] The circumstantial evidence adequately established that someone named "Frank" received and placed telephone calls dealing with illegal gambling from telephones located in

[7] Some confusion existed as to whether a telephone having number 882-8195 was registered to one Virginia Warren or Virginia Fox, and, moreover, whether this phone was located in the Woods' residence. The government's witness, C. Robert Ellis, made a further check of telephone company records and established that this phone was located in the Woods' residence as the government contended. Similarly, the fact that Tabella had a young son named "Joe" only goes to the weight to be given Special Agent Britton's voice identification and does not make such testimony inadmissible *per se*. (See also, conversation 167, a call to "Joe" at the Tabella residence wherein "Joe" complains that his "kid" has his car.)

[8] While evidence was submitted at trial establishing that DeLucia had a son named Joseph, we do not recall any evidence concerning a Frank DeLucia Jr., and assume *arguendo* that defense counsel's representations at oral argument concerning a Frank, Jr., have a basis in the record.

the DeLucia residence. Two sets of calls support the government's contention that the senior DeLucia was the "Frank" participating in the gambling operation.[9] In these calls, Woods called the DeLucia residence, a child answered, Woods asked if the child's father, "Frank", was there; DeLucia's wife, "Becky", then came to the phone and informed Woods that "Frank" was at Leo's; Woods then called a number registered to Leo T. McGrath and spoke to "Frank" about the gambling operation. Based on these two sets of conversations the jury could find, with reason, that the senior DeLucia, rather than his son, was participating in the illegal gambling operation.[10]

The Inconsistency in the Jury's Verdicts

Numerous objections are based upon the jury's verdicts being inconsistent in that they acquitted the defendants of conspiracy and convicted them of the substantive violation. Defendants contend that the indictment was duplicitous; that the jury's verdicts are inconsistent and a nullity; and, because the defendants were ultimately acquitted of the conspiracy count, declarations of co-conspirators were erroneously admitted into evidence at the trial.

Since all defendants were acquitted of conspiracy defendants are entitled to no relief even if the indictment was duplicitous, and assuming *arguendo* that the verdicts

[9] See conversations 102, 107, 146 and 147.

[10] While the calls in which DeLucia's wife and children participated appear innocuous on their face—the type of call that should be terminated by the monitoring agent—we believe the fact that Woods was attempting to speak to "Frank" put the monitoring agents on notice of the evidential value of the calls, and they were therefore properly monitored.

are inconsistent, such inconsistency has long been one of a jury's prerogatives. *United States v. Fiorella*, 468 F. 2d 688, 690 (2d Cir. 1972). Likewise, the fact that the defendants were charged with conspiracy, but acquitted, despite strong evidence of conspiracy, does not retroactively render inadmissible the hearsay which was allowed into evidence under the declarations of the co-conspirators' exception to the hearsay rule. This hearsay evidence remained competent and its admission does not vitiate the jury's verdict finding the defendants guilty only of the substantive offense. *United States v. Herr*, 338 F. 2d 607, 610 (7th Cir. 1964); *Burns v. United States*, 286 F. 2d 152, 155 (10th Cir. 1961); *Coplin v. United States*, 88 F. 2d 652, 661 (9th Cir. 1937).

We find nothing talismanic in the form in which the jury rendered its verdicts which would entitle these defendants to a new trial.

Opinion and Expert Witnesses

Defendants contend that this court erred in allowing Special Agents Meek, Thompson, and Burton to give certain opinions, and in allowing the government's expert on gambling, Special Agent T. C. Whitcomb, to testify when defendants were not supplied with a copy of his report prior to trial.

Special Agent Meek gave his opinion that the pen register, an instrument used in this case to determine the outgoing telephone numbers being dialed on monitored phones, was an accurate instrument. Agent Meek had not tested the pen register used in this particular case, but testified to the accuracy of the pen register generally. Agent Meek was a college graduate; he had one month of specialized

training by the Federal Bureau of Investigation in electronic surveillance, and eight months practical experience in such work; he had read books dealing with the pen register; and he had used the pen register when working on two other wiretap cases. While Agent Meek was not an eminently qualified expert, we believe he was sufficiently qualified to give his opinion as to the pen register's reputation for accuracy. His opinion found later support in the numerous recorded conversations in which the parties to the calls were identified by name or voice identification as being individuals whose residences contained telephones bearing the same numbers which the pen register had reported.

Agents Thompson and Burton gave certain opinions concerning gambling. They were not experts as gamblers, but both did have considerable experience in investigating gambling cases. We believe such investigative experience sufficiently qualified these agents so as to allow them to express their opinions on certain aspects of the gambling operation involved in this case. *Moore v. United States*, 394 F. 2d 818 (5th Cir. 1968); *Commonwealth v. Ametrane*, 210 A. 2d 902 (Pa. Super. 1965), *aff'd* 221 A. 2d 296 (Pa. 1966); *Commonwealth v. Smith*, 140 A. 2d 347, 349 (Pa. Super. 1958).

Finally, defendants object to the testimony of Special Agent T. C. Whitcomb, contending that they were entitled to have a report covering his testimony prior to trial. We have found no authority which entitles a defendant, as a matter of right, to a gambling expert's report. Rule 16, Fed. R. Crim. P., is limited to reports of physical or mental examinations, and scientific tests or experiments. In any

event, when this court was informed by the government that it intended to use an expert witness on gambling, his report was ordered to be supplied to the defendants at least five days before he testified, this was done, and none of the defendants requested a continuance to further study Whitcomb's report. On these facts, we can see no prejudice to the defendants because Whitcomb's report was not supplied prior to trial. *Cf.* Rule 16(g), Fed. R. Crim. P.

Errors in the Court's Charge and Supplemental Instructions

Defendants' attack on the court's charge centers on the definition of the word "conduct" and the supplemental explanation of "knowingly and wilfully" given in response to a question from a juror.

In the charge, this court instructed that all participants in the operation of an illegal gambling business, except customers and persons placing bets, are conducting the business within the meaning of 18 U.S.C. § 1955. We believe this to be a correct statement of the law. *United States v. Ceraso,* 467 F. 2d 653, 656 (3d Cir. 1972); *United States v. Becker,* 461 F. 2d 230, 232 (2d Cir. 1972); *cf. United States v. Palmer,* 465 F. 2d 697, 699 (6th Cir. 1972); *United States v. Riehl,* 460 F. 2d 454, 459 (3d Cir. 1972); *United States v. Harris,* 460 F. 2d 1041, 1049 (5th Cir. 1972). Contrary to defendants' contention, we do not believe this court erred in defining the term "conduct".

During the course of deliberations, Juror No. 10 sent to the court a statement and later a question dealing with the use of the terms "knowingly and wilfully" in the indict-

ment.[11] It seemed from these communications that this juror felt that the government had the burden of proving that the defendants knew that a federal law prohibiting illegal gambling business had been enacted and that they wilfully and knowingly violated it. In response to this juror's second question, an instruction defining the terms "knowingly and wilfully" was given, and the jury was told they were not required under the indictment or the law to find that the defendants knew the size of, or the number of participants in the illegal gambling business, or that a federal law proscribed such a business; but, that it was only necessary that the defendants knew that Pennsylvania state law made their activities criminal.[12] Defendants object to the correctness of this instruction.

We believe that a fair reading of the indictment shows that it only charges that the defendants "knowingly and wilfully" performed the proscribed act with specific intent to do something the state law forbids, and it does not interject the requirement that they did so with knowledge that

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[11] Juror No. 10's statement was as follows:

"I have no doubt in my mind that the defendants performed illegal gambling acts.

"I myself did not know there was a Federal Law enacted prohibiting gambling.

"I can not in all fairness render a verdict that all defendants of [*sic*] the specific wording.—'wilfully' and 'knowingly' conspired against Title 18 United States Code. First count. and 'knowingly' and 'wilfully' [*sic*] ran a gambling operation in violation of Title 18 United States Code. Second Count."

The question was as follows:

"Am I permitted to render a verdict if the words wilfully and knowingly in connection with the words regarding Title 18 United States Code are omitted [*sic*]?"

[12] See transcript of the court's charge, pp. 76-78.

a federal law proscribed their acts as well.[13] Nor do we believe the law requires such knowledge. While no case clearly decides the issue, 18 U.S.C. § 1955 is the type of statute only requiring a general criminal intent,—a voluntary and intentional doing of an act which the statute makes unlawful—and knowledge that such act is unlawful under federal law is not necessary. *United States v. Erlenbaugh*, 452 F. 2d 967, 973 (7th Cir. 1971), *aff'd* —— U.S. —— (12/12/72); *United States v. Miller*, 379 F. 2d 483, 486 (7th Cir. 1967); *cf. United States v. Weiler*, 458 F. 2d 474 (3d Cir. 1972). We believe the response to the juror's

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[13] The indictment charges:

"That from on or about the 1st day of December, 1970, through on or about the 12th day of July, 1971, in the Western District of Pennsylvania, * * * *the defendants herein, did knowingly and wilfully conduct, finance, manage, supervise, direct, and own an illegal gambling business*, such business having a gross revenue of $2,000 or more on one or more single days, involving five or more persons in its conduct, financing, management, supervision, direction, and ownership, being in substantially continuous operation for a period in excess of thirty days, and being in violation of the laws of the Commonwealth of Pennsylvania, Purdon's Pennsylvania Statutes, Title 18, Sections 4601 and 4607; in violation of Sections 1955 and 2, Title 18 United States Code." (Emphasis supplied.)

While the emphasized portion of the indictment does require that a defendant has *specific intent* to participate in an "illegal gambling business", it does not require a specific intent to violate the federal statute and, we believe, the intent requirement of this indictment is satisfied when a defendant participates in a proscribed manner in a gambling business he knows *state* law forbids. In short, "illegal gambling business" as used in the emphasized portion of the indictment is not a term of art incorporating all the jurisdictional requirements of size and continuity set out in the federal statute, rather the term as used is a descriptive one referring to a gambling business illegal under state law. The remainder of the indictment, which charges the elements necessary to bring the business within the reach of the federal statute, would be superfluous if the term "illegal gambling business" in the emphasized portion was an all inclusive term of art.

question was a correct statement of the law and properly given to clear up his obvious misunderstanding as to the effect to be given the words "knowingly and wilfully" in the indictment.[14]

At trial defendants also objected to the court's supplemental instruction to the jury that even though the indictment charged multiple acts in the conjunctive, proof that one of the acts so charged was committed by a named defendant was sufficient to support his conviction. This principle is so well established that this objection does not merit discussion here. *United States v. Gimelstob*, ____ F. 2d ____ (3d Cir. 2/21/73).

Search of the Tabella Residence

Defendant Tabella contends that Agents of the Federal Bureau of Investigation searched his home under color of a search warrant for another residence, thereby vitiating any consent from him for such search and rendering inadmissible certain demonstrative evidence seized by the government and used at trial as the product of an illegal search and seizure. This objection was raised for the first time at trial and is untimely under Rule 12(b)(3), Fed. R. Crim. P. Moreover, Tabella's reliance on *Bumper v. North Carolina*, 391 U.S. 543 (1968), is misplaced[15] because the

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[14] The jury delivered a unanimous verdict within 11 minutes after they were given this supplemental instruction. See also, United States v. Kohne, ____ F. Supp. ____ (W.D. Pa. 4/23/73), dealing with defendants' contentions that Juror No. 10 was coerced into rendering a verdict.

[15] In Bumper officers asserted that they had authority to search a private residence under a search warrant, but at trial the prosecution relied on consent to validate the search not a warrant. The Supreme Court held that the officers' representation that they had a warrant vitiated any consent to the search.

undisputed facts surrounding the search of his residence show that he gave his consent knowingly, and the agents did not in any way act under color of an invalid warrant.

The only evidence concerning the search of Tabella's residence came from Special Agent Britton. He testified that he went to Tabella's residence at 192 Provost Street on July 12, 1971; he informed Tabella he wanted to search for gambling paraphernalia and that he had a search warrant for Tabella's former residence at 3710 Sawmill Run Boulevard; that he stressed that he had no legal authority to search the new residence unless Tabella consented; and that Tabella reviewed a consent to search form, refused to sign it, but orally informed Special Agent Britton that he consented to the search.

Clearly this is not a case where officers searched under color of an invalid or nonexistent warrant; therefore *Bumper v. North Carolina, supra,* is inapposite to these facts. Here the agents took great pains to inform Tabella they did not have a valid search warrant, and Tabella, obviously to give the impression that he had nothing to hide, voluntarily and knowingly consented to the search. On this record we can only find that Tabella gave valid consent to have his residence searched, and, contrary to defendant's contention the evidence derived therefrom was properly admitted at trial. *Cf. Hoover v. Beto,* 467 F. 2d 516, 520 (5th Cir. 1972); *Leeper v. United States,* 446 F. 2d 281, 284 (10th Cir. 1971); *United States ex rel. Combs v. La Vallee,* 417 F. 2d 523, 525 (2d Cir. 1969).

The guilty pleas of Quay and Kosh

After the jury was sworn and counsel for the defendants introduced, two defendants, James Quay and Jeanne Kosh pleaded guilty in the absence of the jury. The remaining defendants immediately moved for a mistrial, contending that the conspicuous absence of these two defendants would prejudice them. The motions were denied, but the court offered to inform the jury of the pleas and give the required cautionary instruction.[16] This offer was unanimously declined by defendants. Accordingly, the jury was never told that Quay and Kosh had pleaded guilty, but was told in the court's charge that they were not permitted to speculate on the absence of Quay and Kosh from the trial.[17] Defendants contend that it was error to continue with the trial after these guilty pleas were accepted. We disagree.

The cases clearly hold that it is not error to accept the guilty pleas of a co-defendant during the course of a trial. *United States v. Broadhead*, 395 F. 2d 761 (2d Cir. 1968); *United States v. Kahn*, 381 F. 2d 824, 836 (7th Cir. 1967); *United States v. Edwards*, 366 F. 2d 853 (2d Cir. 1966); *Wood v. United States*, 279 F. 2d 359 (8th Cir. 1960); *United States v. Stallings*, 273 F. 2d 740 (2d Cir. 1960); *Davenport v. United States*, 260 F. 2d 591 (9th Cir. 1958); *cf. Freije v. United States*, 386 F. 2d 408 (1st Cir. 1967).

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[16] The instruction tendered to defendants was patterned after those given in Wood v. United States, 279 F. 2d 359 (8th Cir. 1960), and Davenport v. United States, 260 F. 2d 591, 596 (9th Cir. 1958), and, in short, told the jury that the guilty pleas of the co-defendants are not evidence against the remaining defendants, nor are they evidence that a crime has been committed.

[17] See the transcript of the court's charge at p. 6. *Cf.* United States v. Panepinto, 430 F. 2d 613 (3d Cir. 1970).

The only question with such procedure being the propriety of the court informing the jury of such a guilty plea on its own motion. Compare *United States v. Edwards, supra,* at 870, with *Wood v. United States, supra,* at 363.[18] In this case the defendants, for obvious reasons of strategy, decided that the jury should not be informed of the guilty pleas and given the appropriate cautionary instruction. The defendants were not entitled to have a mistrial declared merely because two of the defendants pleaded guilty. The options that were available were explained to them and they made a *unanimous* choice that the jury not be informed of the guilty pleas of their co-defendants. This court respected the defendants' decisions and considering all the circumstances, we perceive no error in the procedure followed.

Use of Transcripts and Earphones by the Jury

Defendants contend that this court erred in allowing the jury to follow the taped conversations with the aid of transcripts, and that they were denied a public trial because the jury used earphones to better hear the taped conversations.

The transcripts used by the jury were available to defense counsel before trial and they were ordered to inspect and submit written objections to them prior to trial.[19] Furthermore, objections to the accuracy of the transcripts were

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[18] At least one treatise has opted that it is better that the jury not know of a co-defendant's guilty plea. Wright, Federal Practice and Procedure: Criminal § 499, pp. 339-340.

[19] See paragraph 6 of the pretrial stipulation and order entered January 3, 1973.

considered at trial and the defendants were given the benefit of any doubt concerning their accuracy. Under these circumstances we believed it was appropriate to use those transcripts to which no substantial objection was made as visual aids to the jury in following the recorded evidence.

Likewise, we do not believe that the fact that the court, the jury, defendants and counsel were permitted to use earphones to better hear the recorded conversations denied defendants a public trial. During all but a few days of trial a public address system enabled spectators to hear the recorded exhibits offered by the government, and at all times during the trial extra earphones were available for spectators. In any event this very issue has been raised before and, without exception, it has been held that the use of earphones does not infringe upon a defendant's right to a public trial. See: *Iva Ikuko Toguri D'Aquino v United States,* 192 F. 2d 338, 365 (9th Cir. 1951); *Gillars v. United States,* 182 F. 2d 962, 977 (D.C. Cir. 1950). Even when a public address system and the extra earphones were not available for spectators we agree with the *D'Aquino* case, *supra,* where it was stated at 365:

> "• • • Essentially the recordings were exhibits and we think that appellant might as logically argue that she was denied a public trial because certain exhibits such as photographs, samples of handwriting, etc., although examined by the parties and by the jury were not passed around to the spectators in the courtroom. We think that the contention as to lack of public trial is wholly without merit."

The Weight and Sufficiency of the Evidence

All defendants object to the weight and sufficiency of the evidence, contending that they are entitled to judgments of acquittal. In light of the jury's verdict, the government is entitled to have the evidence viewed in a light most favorable to the prosecution, respecting the right of the jury to draw inferences. *Glasser v. United States,* 315 U.S. 60, 80 (1942); *United States v. De Cavalcante,* 440 F. 2d 1264, 1273 (3d Cir. 1971). So viewed the evidence at trial established the following:

William Kohne admittedly managed, financed directed and owned a substantial gambling operation involving both numbers and sports betting. Kohne hired employees, gave orders to subordinates, was ultimately responsible for paying off winners, and insured that his operation remained solvent by laying off large bets. In the legitimate business world Kohne would be characterized as the chief executive officer of the illegal gambling business proved by the government.

Defendants, Joseph Tabella, Jeanine Denham and Patrick Denham, were secondary level employees, under Kohne, who would gather numbers bets and pass them on to Kohne or, in the case of Tabella, to Kohne's salaried employee Jeanne Kosh.[20]

Defendants Woods and DeLucia were involved in the sports side of the Kohne gambling business. Woods re-

[20] As to Tabella, see conversations 4 and 155-168. As to Jeanine and Patrick Denham, see conversations 1, 2, 4, 17-20, 33-36, 39-42, 54-56, 68-70, 213 and 214.

ceived the betting line (point spread) from DeLucia,[21] passed it on to bettors and subordinates, accepted bets on sports events,[22] and laid off some of the larger bets to DeLucia.[23] Woods was in constant contact with Kohne, receiving instructions from him,[24] discussing and dividing up winnings with him,[25] and reporting line information and on the progress of the sports aspect of the Kohne operation.[26] DeLucia dealt only with Woods, but was a necessary and indispensable part of the sports side of the Kohne business and therefore a participant therein.[27] *United States v. Riehl,* 460 F. 2d 454, 459 (3d Cir. 1972). In addition a certain amount of overlap existed between the two segments of the Kohne business as evidenced by Woods occasionally accepting numbers bets and passing them on to Kohne's employee Kosh.[28]

The evidence showed that the combined sports and numbers gambling operation controlled by Kohne involved five or more participants, was in substantially continuous operation for over 30 days (February 6, to April 6, 1971), and

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[21] See conversations 124, 135, 147, 197, 198, 199, 200 and 201.

[22] See conversations 112-119; 128-134.

[23] See conversations 103, 125, 139, 140, 148, 149, 152 and 203. This procedure necessitated Woods and DeLucia to compare accounts, see conversations 124, 147, 152 and 202.

[24] See conversations 7, 11, 14, 16, 82, 90, 91, 95, 109, 110 and 111.

[25] See conversations 15, 31, 82, 95, 126 and 153.

[26] See conversations 6, 8, 9, 10, 12, 38, 81, 98, 109, 127 and 150.

[27] In addition to the conversations, the government also introduced betting slips, a quantity of rice paper, and other assorted gambling paraphernalia seized during raids conducted on the residences of all six defendants presently under consideration.

[28] See conversations 141, 142 and 154.

grossed over $2,000 on certain days.[29] We believe the above to be sufficient to support defendants' convictions.

Defendants contend that the government charged only one business was involved, but proved two businesses—a numbers business and a sports business—and that applying the law to the evidence in this case, that evidence cannot support a conviction on the one business theory charged in the government's indictment. We disagree.

The statute the defendants have been convicted of violating, 18 U.S.C. § 1955, makes no distinction between the type of gambling conducted but speaks in the generic term of a "gambling business". The statute is aimed at business-type gambling operations of considerable size and specifically states that the subject matters of the Kohne business, bookmaking and the numbers game, come under the term "gambling". See: U.S. Code and Admin. News, 1970, p. 4029 and 18 U.S.C. § 1955(b)(2). Nowhere in the statute or the legislative history is it intimated that the various innumerable species of gambling are to be segregated and considered separately in determining if the statutory requirements are met. All syndicated gambling proscribed by state law is the focal point of the statute, with emphasis on size and continuity, rather than the name of the particular game being played by the patrons of the business.

We need go no further than to state that if defendants' contention was correct, it would be (hypothetically) possible

[29] The evidence was also sufficient to show that the numbers and sports aspects of the operation, when considered separately, met the requirements of 18 U.S.C. § 1955, but this was not the theory of the government's case and is irrelevant for purposes of the present motions.

for someone to own a gambling casino, hire three employees to maintain slot machines, three others to operate roulette wheels, and three more to oversee dice tables, remain in operation over 30 days, gross over $2,000 daily, and violate the law of the state in which the casino was operating—all without coming within the parameters of 18 U.S.C. § 1955. We do not believe this to be the law.

In this case William Kohne owned, financed, supervised, and directed *one* illegal gambling business involving two types of gambling. He was the chief executive officer and made managerial decisions. Given the other statutory requirements, this is precisely the type of syndicated business 18 U.S.C. § 1955 was aimed at. Because of Kohne's key position we believe the jury properly found that the numbers operation and the sports operation were one illegal gambling business for purposes of 18 U.S.C. § 1955.[30]

Defendants' motions will be denied. An appropriate order will be entered.

ORDER OF COURT.

AND NOW, to-wit, this 25th day of April, 1973, after oral argument and upon due consideration of the briefs submitted, IT IS ORDERED ADJUDGED AND DECREED that the motions for a new trial, arrest of judgment, and judgment of acquittal filed on behalf of defendants William Paul Kohne, Paul Patrick Woods, Joseph

[30] This issue was submitted to the jury in the court's charge, and they obviously resolved it in favor of the government. See transcript of the court's charge, pp. 34-35.

Tabella, Patrick Denham, Jeanine Denham and Frank DeLucia, be and the same hereby are denied.

IT IS FURTHER ORDERED that:

The defendant, William Paul Kohne, shall appear in Courtroom No. 1 for sentencing on Friday, the 4th day of May, 1973, at 10:00 A.M.

The defendant, Paul Patrick Woods, shall appear in Courtroom No. 1 for sentencing on Tuesday, the 15th day of May, 1973, at 11:00 A.M.

The defendant, Joseph Tabella, shall appear in Courtroom No. 1 for sentencing on Wednesday, the 16th day of May, 1973, at 3:30 P. M.

The defendants, Patrick Denham and Jeanine Denham, shall appear in Courtroom No. 1 for sentencing on Monday, the 14th day of May, 1973, at 3:30 P. M.

The defendant, Frank DeLucia, shall appear in Courtroom No. 1 for sentencing on Monday, the 14th day of May, 1973, at 2:30 P. M.

RABE F. MARSH,
United States District Judge.

cc:

Samuel J. Orr, III,
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Pittsburgh, Pa. 15219.

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Counsel for Paul Patrick Woods.

Gilbert M. Gerber, Esq.,
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Counsel for Frank DeLucia.

United States District Court for the Western District of Pennsylvania, Memorandum and Order Dated May 15, 1973

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, JEANNE KOSH, PATSY STANIZZO, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANINE DENHAM, JAMES QUAY, FRANK DELUCIA.

Criminal Action No. 71-254.

REASONS FOR DENYING DEFENDANTS' CONSOLIDATED MOTION FOR A NEW TRIAL

MARSH, *Chief Judge.*

After post-trial motions filed on their behalf had been denied,[1] and three days before their sentencing, Patrick Denham and Jeanine Denham, through newly-appointed counsel,[2] filed a consolidated motion for a new trial assert-

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[1] United States v. Kohne, ____ F. Supp. ____ (W.D. Pa. 4/25/73).

[2] The Denhams' trial counsel, James A. Ashton, Esq., was granted leave to withdraw from the case after filing and arguing timely post-trial motions, and Edward Schmidt, Esq. was appointed to represent the Denhams for sentencing and appeal.

ing three additional reasons why they should be granted a new trial. The motion will be denied because it is untimely under Rule 33, Fed. R. Crim. P., and for the following additional reasons:

I.

First, the fact that the Denhams had a 23-year-old son named Patrick Denham, Jr. and a 15-year-old daughter named Jeanine M. Denham cannot be categorized as newly-discovered evidence. Moreover, the conversations which the government contends the Denhams participated in conclusively show that the elder Denhams, rather than their children, were involved in the gambling operation.

In one series of calls, "Pat" calls "Reenie" (Doreen Kohne) and inquires about $1200 that one Joe Tabella was to deliver to him (Conversation 1); William Kohne then calls Joe Tabella who informs him that he left the money with "Jeanine's" daughter (Conversation 4); and "Pat" then calls "Reenie" and informs her that his 18-year-old daughter had received $1200 from Joe Tabella while "Jeanine" was shopping and failed to inform him of the delivery (Conversation 2).

In other conversations, William Kohne calls the Denham residence, a child answers, Kohne asks for the child's mother, and "Jeanine" comes to the phone and discusses the gambling operation (Conversations 54 and 55). And in one conversation, Jeanne Kosh tells Jeanine, "I was just getting ready to call your husband."

Obviously, the "Jeanine" and "Pat" participating in the Kohne gambling operation were married and the parents

of several children. This description only fits the convicted defendants, and even if evidence had been produced at trial showing that they had children with the same or similar names, it would not have resulted in a judgment of acquittal or a different verdict.

II.

Contrary to defendants' second contention, the wiretap evidence was admissible despite the Pennsylvania Act of July 16, 1957, P. L. 956, No. 411, § 1; 18 Purdon's Pa. Stat. Ann. § 341, which forbids wiretapping in the Commonwealth of Pennsylvania. It is well settled that federal law governs the admissibility of evidence in federal criminal trials, even if it conclusively appears that the evidence was illegally obtained under state law. *Olmstead v. United States,* 277 U.S. 438, 469 (1928); *United States v. Escobedo,* 430 F. 2d 603, 607 (7th Cir. 1970), *cert. denied* 402 U.S. 951 (1971); *United States v. Krol,* 374 F. 2d 776, 778 (7th Cir. 1967). In light of the specific federal statute allowing wiretapping, 18 U.S.C. §§ 2510, *et seq.,* it is beyond dispute that properly gathered wiretap evidence was admissible into evidence at this trial.

United States Constitution, Art. VI, § 2.

III.

Finally, the contentions of the defendants that they did not have adequate representation of counsel to which they were constitutionally entitled are falacious and without merit. Their counsel, Mr. Ashton, was not appointed counsel, but was retained. There was no situation inherent in the trial where counsel would have been both

inculpating his clients, the Denhams, and exculpating his client, William Kohne. The defenses available to Kohne and to the Denhams were not antagonistic. The record clearly shows that Mr. Ashton, as counsel for the Denhams, and for Kohne, effectively served the interests of Kohne and the Denhams, and, to a large extent, all the other defendants who stood trial. At the pretrial hearings and the pretrial conferences, it appeared that there was no conflict of interest in the multi-representation by Ashton of the Denhams and Kohne. I regret, of course, that I did not affirmatively procure waivers of joint representation for the record, but I have not the slightest doubt that they would have been forthcoming if the matter had been brought to their attention.[3]

It does not appear that any evidence of substance was withheld to the disadvantage of the Denhams and which benefited Kohne. The evidence in the case clearly shows that the Denhams were numbers writers who almost daily relayed numbers to Kohne. The taped conversations referred to above denigrated the possibility that the Denhams' young son and daughter, of the same names, were the persons who actually participated in the illegal gambling business by reporting the numbers over the telephone to Kohne. This conclusion was fortified by evidence which was seized in their home pursuant to a search warrant, their own admissions to the agents who searched their home that they had engaged in the numbers business as writers, and Kohne's testimony.

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[3] See, for example, Tr., pp. 14-20, where the Denhams waived their rights to be present and to have counsel representing them present during the course of the proceedings.

Memorandum and Order Dated May 15, 1973

The allegation that the defendant's trial counsel, Ashton, failed to bring out that the Denhams had a 23-year-old son named Patrick and a 15-year-old daughter named Jeanine, living at their home, was not a line of inquiry which would have benefited Kohne, and counsel's decision not to risk the dubious benefit of obtaining a defense verdict by persuading the jury that the young children, of the same name, were the actual numbers writers, earning commissions from Kohne, was well within the range of normal competency by which the effective assistance of counsel could be judged. *Moore v. United States,* 432 F. 2d 730, 736-737 (3d Cir. 1970). Such evidence, at best, would have been of doubtful value, if not harmful, to the defendants, if brought out at the trial.

In short, the Denhams have made no showing of a possible conflict of interest or prejudice arising from the joint representation. *Cf. United States v. Rispo,* 460 F. 2d 965 (3d Cir. 1972); *United States ex rel. Small v. Rundle,* 442 F. 2d 235 (3d Cir. 1972). The defenses of Kohne were the defenses of the Denhams and the other defendants who stood trial.

An appropriate order will be entered.

ORDER OF COURT.

AND NOW, to-wit this 15th day of May, 1973, after due consideration, IT IS ORDERED that the consolidated motion of the defendants, Patrick Denham and Jeanine Denham, for a new trial be and the same hereby is denied.

RABE F. MARSH,
United States District Judge.

cc:

Samuel J. Orr, III,
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633 United States Courthouse,
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Counsel for Paul Patrick Woods.

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Counsel for Frank DeLucia.

Judgment Order of the United States Circuit Court of Appeals for the Third Circuit Affirming the Judgments of Sentence of the United States District Court for the Western District of Pennsylvania, November 26, 1973

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 73-1500 and 73-1501

UNITED STATES OF AMERICA, *Appellee,*

v.

WILLIAM PAUL KOHNE, PAUL PATRICK WOODS, FRANK DE LUCIA, JEANNE KOSH, BETTY HOWDEN STANIZZO, JOSEPH TABELLA, PATRICK DENHAM, JEANNE DENHAM, JAMES QUAY, PATSY STANIZZO,

Appeal of WILLIAM PAUL KOHNE (73-1500)
Appeal of PAUL PATRICK WOODS (73-1501),
Appellants.

Appeal From the United States District Court for the Western District of Pennsylvania

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Argued November 9, 1973
Before VAN DUSEN, HUNTER and GARTH,
Circuit Judges

RICHARD L. THORNBURGH,
United States Attorney,

SAMUEL J. ORR, III,
Assistant United States Attorney,
Attorneys for Appellee.

JAMES A. ASHTON,
Attorney for Appellant—Kohne,

JAMES R. FITZGERALD,
Attorney for Appellant—Woods.

Judgment Order Dated November 26, 1973

JUDGMENT ORDER

We have considered the contentions of William Paul Kohne and Paul Patrick Woods that:

I. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. Sections 2510 through 2520 is unconstitutional.

II. Title VII of the Omnibus Crime Control Act of 1970, 18 U.S.C. 1955 is unconstitutional.

III. The wire interception authorizations were not properly approved by the Attorney General.

IV. They were denied their right to an impartial jury by the coercion of a juror.

We find all of these contentions to be without merit and ORDER and ADJUDGE that the judgment of the district court be affirmed. No costs.

Date: Nov. 26, 1973.

BY THE COURT,

.....

JAMES HUNTER, III, *Circuit Judge,*

Attest:

.....

THOMAS F. QUINN, *Clerk.*

18 U.S. Code 25" et seq

Constitutional Provisions and Statutes Involved

§ 2511. Interception and Disclosure of Wire or Oral Communications Prohibited

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) (a) It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication: *Provided,* That said communication common carriers shall not utilize observing or random monitoring except for mechanical or service quality control checks.

(b) It shall not be unlawful under this chapter for an officer, employee, or agent of the Federal Communications

Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of chapter 5 of title 47 of the United States Code, to intercept a wire communication, or oral communication transmitted by radio, or to disclose or use the information thereby obtained.

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything concontained in this chapter be deemed to limit the constitutional power of the President to take such measures as he

deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968, § 2 Stat. 213.

§ 2512. MANUFACTURE, DISTRIBUTION, POSSESSION, AND ADVERTISING OF WIRE OR ORAL COMMUNICATION INTERCEPTING DEVICES PROHIBITED

(1) Except as otherwise specifically provided in this chapter, any person who willfully—

(a) sends through the mail, or sends or carries in interstate or foreign commerce, any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications;

(b) manufactures, assembles, possesses, or sells any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications, and that such device or any component thereof has been or will be sent through the mail or transported in intestate or foreign commerce; or

(c) places in any newspaper, magazine, handbill, or other publication any advertisement of—

(i) any electronic, mechanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications; or

(ii) any other electronic, mechanical, or other device, where such advertisement promotes the use of such device for the purpose of the surreptitious interception of wire or oral communications.

knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce,

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(2) It shall not be unlawful under this section for—

(a) a communications common carrier or an officer, agent, or employee of, or a person under contract with, a communications common carrier, in the normal course of the communications common carrier's business, or

(b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or a political subdivision thereof, to send through the mail, send or carry in interstate or foreign commerce, or manufacture, assemble, possess, or sell any electronic, me-

chanical, or other device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire or oral communications.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968 § 2 Stat. 214.

§ 2513. Confiscation of Wire or Oral Communication Intercepting Devices

Any electronic, mechanical, or other device, used, sent, carried, manufactured, assembled, possessed, sold, or advertised in violation of section 2511 or section 2512 of this chapter may be seized and forfeited to the United States. All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19 of the United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of electronic, mechanical, or other intercepting devices under this section

by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968, § 2 Stat. 215.

§ 2514. IMMUNITY OF WITNESSES

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violate this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury

or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968, § 2 Stat. 216.

§ 2515. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90—351, Title III, § 802, June 19, 1968, § 2 Stat. 216.

§ 2516. Authorization for Interception of Wire or Oral Communications

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), or chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contents), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds) or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire or oral communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute

authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.

§ 2517. AUTHORIZATION FOR DISCLOSURE AND USE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 217.

§ 2518. Procedure for Interception of Wire or Oral Communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or

places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension the purposes for which it was granted and in no event for longer than shall be no longer than the authorizing judge deems necessary to achieve

thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a

satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218.

§ 2519. Reports Concerning Intercepted Wire or Oral Communications

(1) Within thirty days after the expiration of an order (or each extension thereof) entered under section 2518, or the denial of an order approving an interception, the issuing or denying judge shall report to the Administrative Office of the United States Courts—

(a) the fact that an order or extension was applied for;

(b) the kind of order or extension applied for;

(c) the fact that the order or extension was granted as applied for, was modified, or was denied;

(d) the period of interceptions authorized by the order, and the number and duration of any extensions of the order;

(e) the offense specified in the order or application, or extension of an order;

(f) the identity of the applying investigative or law enforcement officer and agency making the application and the person authorizing the application; and

(g) the nature of the facilities from which or the place where communications were to be intercepted.

(2) In January of each year the Attorney General, an Assistant Attorney General specially designated by the Attorney General, or the principal prosecuting attorney of a State, or the principal prosecuting attorney for any political subdivision of a State, shall report to the Administrative Office of the United States Courts—

(a) the information required by paragraphs (a) through (g) of subsection (1) of this section with respect to each application for an order or extension made during the preceding calendar year;

(b) a general description of the interceptions made under such order or extension, including (i) the approximate nature and frequency of incriminating communications intercepted, (ii) the approximate nature

and frequency of other communications intercepted, (iii) the approximate number of persons whose communications were intercepted, and (iv) the approximate nature, amount, and cost of the manpower and other resources used in the interceptions;

(c) the number of arrests resulting from interceptions made under such order or extension, and the offenses for which arrests were made;

(d) the number of trials resulting from such interceptions;

(e) the number of motions to suppress made with respect to such interceptions, and the number granted or denied;

(f) the number of convictions resulting from such interceptions and the offenses for which the convictions were obtained and a general assessment of the importance of the interceptions; and

(g) the information required by paragraphs (b) through (f) of this subsection with respect to orders or extensions obtained in a preceding calendar year.

(3) In April of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for orders authorizing or approving the interception of wire or oral communications and the number of orders and extensions granted or denied during the preceding calendar year. Such report shall include a summary and analysis of the data required to be filed with the Administrative Office by subsections (1)

and (2) of this section. The Director of the Administrative Office of the United States Courts is authorized to issue binding regulations dealing with the content and form of the reports required to be filed by subsections (1) and (2) of this section.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 222.

§ 2520. Recovery of Civil Damages Authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or on the provisions of section 2518(7) of this chapter shall constitute a complete defense to any civil or criminal action brought under this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 223.

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	9
Conclusion	14

CITATIONS

Cases:

Bumper v. *North Carolina*, 391 U.S. 543	13
Campbell v. *United States*, 352 F. 2d 359	12
Ford v. *United States*, 379 F. 2d 123	12
Hoffa v. *United States*, 385 U.S. 293	10
Mattox v. *United States*, 146 U.S. 140	10
Olmstead v. *United States*, 277 U.S. 438	9
Schneckloth v. *Bustamonte*, 412 U.S. 218	12
Tillman v. *United States*, 406 F. 2d 930, vacated in part on other grounds, 395 U.S. 830	11
United States v. *Bobo*, 477 F. 2d 974, petition for a writ of certiorari pending *sub nom. Gray* v. *United States*, No. 73-231	9
United States v. *Carlson*, 423 F. 2d 431, certiorari denied, 400 U.S. 847	11
United States v. *Ceraso*, 467 F. 2d 653	10
United States v. *Chavez*, No. 72-1319, certiorari granted, 412 U.S. 905	13, 14

Cases—Continued	Page
United States v. *Cox*, 462 F. 2d 1293, petition for a writ of certiorari pending, No. 72-5278	9
United States v. *Cox*, 449 F. 2d 679, certiorari denied, 406 U.S. 934	9
United States v. *Escobedo*, 430 F. 2d 603, certiorari denied, 402 U.S. 951	9
United States v. *Harris*, 460 F. 2d 1041, certiorari denied, 409 U.S. 877	10
United States v. *Krol*, 374 F. 2d 776	9
United States v. *Palmer*, 465 F. 2d 697, certiorari denied, 409 U.S. 874	10
United States v. *Rispo*, 460 F. 2d 965	12
United States v. *Tortorello*, 480 F. 2d 764, petition for a writ of certiorari pending, No. 72-1703	9
United States v. *Whitaker*, 474 F. 2d 1246, certiorari denied, 412 U.S. 953	9
United States v. *Wolk*, 466 F. 2d 1143	10

Constitution, statutes and rule:	Page
United States Constitution, Fifth Amendment	10
Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, *et seq.*:	
18 U.S.C. 2510-2520	2, 5, 9
18 U.S.C. 2516	3, 5, 13
18 U.S.C. 2518	5
18 U.S.C. 1955	3, 9, 10, 11
18 P.S. 3742	9
Rule (b)(3), Fed. R. Crim. P.	12

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-999

WILLIAM PAUL KOHNE AND PAUL PATRICK WOODS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5819

PATRICK DENHAM & JEANINE DENHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-6015

JOSEPH TABELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. No. 73-999, App. 95-96; Pet. No. 73-5819, App. A) are not reported. The opinions of the district court are reported at 347 F. Supp. 1178 (Pet. No. 73-5819, App. B); 358 F. Supp. 1046 (Pet. No. 73-999, App. 39; Pet. No. 73-5819, App. C); and 358 F. Supp. 1053 (Pet. No. 73-999, App. 65; Pet. No. 73-5819, App. D). The district court memorandum and order of May 15, 1973 (Pet. No. 73-999, App. 89; Pet. No. 73-5819, App. G) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 73-5819 and No. 73-6015 was entered on October 5, 1973. A petition for rehearing filed by petitioners in No. 73-5819 was denied on November 21, 1973. The petition for a writ of certiorari in No. 73-5819 was filed on November 28, 1973. The petition in No. 73-6015 was filed on January 2, 1974, and is out of time under Rule 22(2) of this Court. The judgment of the court of appeals in No. 73-999 was entered on November 26, 1973, and the petition for a writ of certiorari was filed on December 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, was unconstitutionally applied in this case

(raised in Nos. 73-5819 and 73-6015), or is unconstitutional on its face (raised in No. 73-999).

2. Whether the trial court properly determined that petitioners were not denied a fair trial by the alleged coercion of a juror by his fellow jurors (raised in Nos. 73-999, 73-5819 and 73-6015).

3. Whether petitioners were denied effective assistance of counsel because their retained counsel also represented a co-defendant (raised in No. 73-5819).

4. Whether evidence seized from petitioner's residence should have been suppressed as the fruits of an illegal search (raised in No. 73-6015).

5. Whether evidence obtained through electronic interception should have been suppressed on the grounds that the interception applications were not properly authorized under 18 U.S.C. 2516(1) (raised in Nos. 73-999, 73-5819 and 73-6015).

STATEMENT

On December 8, 1971, a two count indictment was returned in the United States District Court for the Western District of Pennsylvania, charging petitioners and five others with conducting an illegal gambling business in violation of 18 U.S.C. 1955 (Count II) and conspiring to commit that offense (Count I). Following a jury trial, petitioners were convicted on the second count and were acquitted on the conspiracy count (Pet. App. 66).[1]

[1] "Pet. App." refers to the Appendix in No. 73-999. Two of the defendants pleaded guilty to the second count of the indictment (Pet. App. 66). All other defendants moved

Petitioner Kohne was fined $10,000 and sentenced to three years' imprisonment, of which he was required to serve six months and the balance was suspended; he was placed on probation for five years. Petitioner Woods was fined $5,000 and sentenced to three years' imprisonment, of which he was required to serve ninety days, and the balance was suspended; he was placed on probation for five years. Petitioner Patrick Denham was fined $1500 and placed on probation for five years; petitioner Jeanine Denham was sentenced to five years' probation. Petitioner Joseph Tabella was fined $1500 and placed on probation for five years.

The district court filed several opinions, including one denying motions to suppress the wire interception evidence and to dismiss the indictment, 347 F. Supp. 1178 (Pet. App. 11-30), and another opinion denying motions for a mistrial and a new trial based on alleged coercion of a juror, 358 F. Supp. 1046 (Pet. App. 39-52). The court of appeals affirmed without opinion (Pet. App. 95-96; Pet. No. 73-5819, App. A).

The government's proof at trial was primarily based on evidence obtained from three court-authorized wire interceptions conducted pursuant to the federal wire interception statute, 18 U.S.C. 2510-2520. Prior to trial, petitioners and the other defendants moved to suppress the tape recordings resulting

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for acquittal after trial; the court granted the motion of two of the defendants, and denied those of the others, including all these petitioners (Pet. App. 63, 86-87).

from these interceptions, alleging that the applications for the interception orders were not authorized as required by 18 U.S.C. 2516(1) (Pet. App. 11).[2] In response, the government filed affidavits of Sol Lindenbaum, Henry E. Petersen, and John Mitchell, which showed that the former Attorney General personally approved the requests to apply for interception orders in this case, and personally intialed memoranda to Will Wilson, then the Assistant Attorney General of the Criminal Division of the Justice Department, informing him of the approval and designating him to authorize the attorney in the field to submit the application to the district judge. The letters of authorization were sent to the field attorneys over Mr. Wilson's signature. Pursuant to Mr. Wilson's directions, and in accord with the usual Justice Department procedures, Mr. Wilson's signature was affixed to the letters by a deputy, in this case by then Deputy Assistant Attorney General Henry Petersen (Pet. App. 21). Mr. Wilson's name appeared in the application and order as the official authorizing the application.

After reviewing the affidavits, the district court denied the motion to suppress the recordings (Pet. App. 30).

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[2] That statute provides that "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction" for an interception order; 18 U.S.C. 2518 directs that the application and order identify the official authorizing the application.

The tapes were introduced at trial, and contained numerous conversations between petitioners and their co-defendants which indicated that they were involved in a gambling business. In addition, a search of petitioners Patrick and Jeanine Denham's household revealed gambling paraphernalia in their possession (Tr. 2171-2176). They admitted to the officer conducting the search that they were numbers writers until May of 1971 (Tr. 2175-2176).

The facts relevant to the search of petitioner Tabella's residence are set out in the April 25, 1973, opinion of the district court (Pet. App. 65, 78-79). They show that on July 12, 1971, federal agents went to 3710 Saw Mill Run Blvd. with a search warrant for Tabella's residence at that address. Tabella was not present there and subsequent investigation revealed that Tabella was then residing at 192 Provost Street. Upon arrival at Tabella's new residence, the agents informed Tabella that they had a search warrant for his former residence, but stressed that the agents had no authority to search the new residence unless Tabella consented. Tabella reviewed a consent form and orally gave his consent to the search, but refused to sign anything.

Petitioner Kohne was the only one of the defendants to testify. Insofar as his testimony is relevant to the issues raised in the petition in No. 73-5819, filed by the Denhams, Kohne testified that he knew the Denhams, and that they turned in numbers to him at times, but that they could and sometimes did turn in their numbers elsewhere (Transcript of Feb-

ruary 12, 1973, pp. 23-24). He testified that the Denhams received a commission on the numbers they turned in to him, and they were not his employees and had no interest in or control of the business (Transcript of February 12, 1973, pp. 24-25).

Kohne further testified that he was the sole owner of his numbers business, no one else had anything to do with the direction or management of it, and that he had only one employee (Transcript of February 12, 1973, pp. 10-11). He claimed that the business was never conducted for 31 consecutive days uninterrupted, and that the amount of his numbers operation never exceeded $2,000 on any given day (Transcript of February 12, 1973, pp. 26-27).

Approximately four days after the jury returned its verdict, juror Steven Tisak met with three defense counsel at the law offices of the Denhams' trial counsel. There he signed a statement in which he complained that other jurors intimidated him and caused him to join in the verdict of guilty. Petitioners filed a motion for a mistrial. The court held a hearing at which counsel for the government and the defendants were given the opportunity to suggest additional questions to be asked of Tisak, but were not allowed to cross-examine him (Pet. App. 40, 42).

Tisak testified that after their night of sequestration, certain jury members "tensed their muscles at me and they told me that I am opinionated" (H. Tr.

17-18),[3] and "[o]ne man flatly stated if he has to sleep in those cots again, he will guarantee me he would be in a federal court in the morning for murder" (H. Tr. 18). Another juror "flexed his muscles" and "hollered" at Tisak (Tr. 19-20). Another man "kept slamming his fist into his hand and he kept saying 'I don't get mad. I just get even' " (H. Tr. 21). Tisak stated that no one actually struck him or physically harmed him in any way (Tr. 18; 21), and that he never complained to the court or to the bailiff (H. Tr. 30-32).

When the jury was polled following the return of the verdict, Tisak agreed that the verdict returned was his verdict, and he did not refer to the alleged coercion (H. Tr. 22). Mr. William Ellis, the court crier, testified that at breakfast following their night of sequestration, the jurors were "jovial" and in "fairly good humor," and Tisak was "talking and laughing" with other jurors (H. Tr. 42).

The district court denied petitioners' motion. It concluded that "the statements and actions of some of the jurors amounted only to heated expressions of annoyance with Tisak during the second day of deliberations; that the threats were empty ones, expressive of impatience, exasperation and frustration, and did not actually cause Tisak to fear bodily harm, or forcibly compel him to change his vote" (Pet. App. 46).

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[3] "H. Tr." refers to the transcript of this hearing, a copy of which we are lodging with the Clerk of this Court.

ARGUMENT

1. Petitioners in Nos. 73-5819 and 73-6015 argue that the wire interception statute (18 U.S.C. 2510-2520) was unconstitutionally applied in this case because Pennsylvania state law forbids wire interceptions (18 P.S. 3742), and the federal crime charged encompasses state law since a gambling business is illegal under 18 U.S.C. 1955(b)(1)(i) only if it is illegal in the state in which it takes place. Federal law, however, governs the admissibility of evidence in federal criminal trials, and under that law evidence is admissible even if it was obtained in violation of state law. *Olmstead* v. *United States*, 277 U.S. 438, 469; *United States* v. *Escobedo*, 430 F.2d 603, 607 (C.A. 7), certiorari denied, 402 U.S. 951; *United States* v. *Krol*, 374 F.2d 776, 778 (C.A. 7).[4]

2. Petitioners in No. 73-999 contend that the wire interception statute unconstitutionally permits unreasonable searches and seizures. Similar challenges have been uniformly rejected by every court of appeals which has passed on them. See, *e.g.*, *United States* v. *Tortorello*, 480 F.2d 764 (C.A. 2), petition for a writ of certiorari pending, No. 72-1703; *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4), petition for a writ of certiorari pending *sub nom. Gray* v. *United States*, No. 73-231; *United States* v. *Whitaker*, 474 F.2d 1246 (C.A. 3), certiorari denied 412 U.S. 953;

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[4] In all of these cases, defendants unsuccessfully objected to the admission in federal criminal trials of recordings of conversations, on the ground that they were obtained in violation of state laws prohibiting such interceptions.

United States v. *Cox*, 462 F.2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278; *United States* v. *Cox*, 449 F.2d 679 (C.A. 10), certiorari denied, 406 U.S. 934. The additional contention that the use of their intercepted conversations against them violated their privilege against self incrimination under the Fifth Amendment is answered by *Hoffa* v. *United States*, 385 U.S. 293.[5]

2. Petitioners' argument that they should have been granted a fuller evidentiary hearing or new trial based upon the contention that juror Tisak was coerced into voting for conviction was answered in the opinion of the district court, upon which we rely (Pet. App. 39).[6] The decision whether to grant a new trial or to order a full evidentiary hearing rests within the sound discretion of the trial court. Since

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[5] In their questions presented, petitioners in No. 73-999 challenge the constitutionality of 18 U.S.C. 1955, under which they were convicted. They do not argue the issue, however. The courts which have considered this issue have uniformly held that the statute is constitutional. See *e.g.*, *United States* v. *Ceraso*, 467 F. 2d 653 (C.A. 3); *United States* v. *Wolk*, 466 F. 2d 1143 (C.A. 8); *United States* v. *Palmer*, 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877.

[6] Petitioners' reliance on *Mattox* v. *United States*, 146 U.S. 140, is improper. A new trial was granted in that case when it was shown by affidavits of jurors that the bailiff told the jury that the defendant had killed two other persons and the jury had read a highly prejudicial newspaper article which commented on the evidence and on the case in general. The court here followed *Mattox* and considered juror Tisak's testimony insofar as it related to the existence of outside influence (Pet. App. 48).

the record here justifies the court's ruling, there is no ground for reversal. *Tillman* v. *United States*, 406 F.2d 930, 938 (C.A. 5), vacated in part on other grounds, 395 U.S. 830; *United States* v. *Carlson*, 423 F.2d 431, 439 (C.A. 9), certiorari denied, 400 U.S. 847.

3. The Denhams, petitioners in No. 73-5819, retained to represent them at trial the same counsel who represented Kohne, petitioner in No. 73-999 (Pet. App. 91). The Denhams now argue that they were denied effective assistance of counsel because of a conflict in interest between themselves and Kohne.[7]

Kohne's testimony indicates that his defense was that his gambling enterprise did not violate a federal statute (18 U.S.C. 1955), because the requisite elements of the federal offense were missing.[8] The Denhams did not present any independent defense, and they do not now allege that any was available to them which was inconsistent with petitioner Kohne's interests. The court saw no conflict between the interests of Kohne and the Denhams throughout the

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[7] The failure of the trial court to obtain a signed waiver from petitioners agreeing to joint representation does not merit a reversal of the case. Petitioners undoubtedly knew they had a right to counsel, since they retained Mr. Ashton.

[8] Those elements are that there must be "five or more persons who conduct, finance, manage, supervise, direct, or own" the business, and that it remained "in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C. 1955. A review of Kohne's testimony shows that he carefully denied the existence of each of these elements (Transcript of February 12, 1973, pp. 10-13, 26-27).

pretrial hearings and conferences (Pet. App. 92). Since their defenses were not inconsistent, they were not prejudiced by Kohne's testimony, nor were they denied effective assistance of counsel. *Campbell* v. *United States*, 352 F.2d 359 (C.A.D.C.); *United States* v. *Rispo*, 460 F.2d 965, 971 (C.A. 3).[9]

4. Petitioner Tabella in No. 73-6015 contends that the evidence seized from his residence should have been suppressed because he merely "acquiesced to authority" and did not consent to the search.

The district court pointed out that his objection was raised for the first time at trial (No. 73-5819, Pet. App. D-9); the objection was therefore untimely under Rule 12(b)(3), Fed. R. Crim. P. In any event, the contention is without merit. The validity of a consent search in a case such as this is governed by *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, where this Court held that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."[10] As shown in the statement,

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[9] There is no conflict between circuits on the question whether each defendant must have his own attorney (No. 73-5819, Pet. 11). *Ford* v. *United States*, 379 F. 2d 123 (C.A. D.C.), cited by petitioner, considers the court's responsibilities in appointing counsel for codefendants. It does not indicate that each defendant must be represented by separate counsel, even absent a showing of prejudice.

[10] Tabella was informed of his right to refuse consent to the search (Pet. App. 79), an element not required by *Schneckloth*, but identified as a factor to be taken into account, in determining the voluntariness of the consent, 412 U.S. at 249.

petitioner Tabella was not coerced into consenting to the search. As the district court noted (Pet. App. 78-79), the facts of this case distinguish it from *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner relies.

5. Petitioners contend that evidence seized through use of the court-ordered interceptions should have been suppressed because the interception applications were not properly authorized as required by 18 U.S.C. 2516(1), even though they were personally approved by the Attorney General. The facts concerning the authorization of the applications by the Attorney General are set forth in the first opinion of the district court (Pet. App. 19-21). The validity of the Department of Justice's internal procedures in authorizing electronic interception, and the propriety of suppressing evidence so obtained in a case such as this, are questions now before the Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted, 412 U.S. 905, in which argument was heard on January 8, 1974.

CONCLUSION

The petitions for writs of certiorari should be denied. Since the issue of the validity of the wire interception application procedure followed in the instant case is before this Court in *Chavez*, however, the Court should defer disposition of these petitions until after it has decided *Chavez*.

Respectfully submitted.

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